CONCLUSIONS OF LAW

CASE NO. 2:15-CV-02158 PA(FFMX)

In support of Fox's Reply In Support Of Motion For Summary Judgment, plaintiffs and counterclaim defendants Twentieth Century Fox Television, a division of Twentieth Century Fox Film Corporation, and Fox Broadcasting Company (collectively, "Fox") offers the following Reply Statement Of Uncontroverted Facts And Conclusions Of Law.

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## FOX'S UNCONTROVERTED FACTS

## SUPPORTING EVIDENCE

## **First Amendment**

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1. *Empire* is a musical dramatic television series set in New York, which tells the story of a fictional company

called Empire Enterprises.

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**Defendant's Response:**Objection/Disputed in part.

EMPIRE objects to this statement on the following grounds:

- (1) Lacks foundation.
- (2) Hearsay.
- (3) Lacks authentication.

Subject to these objections, EMPIRE does not dispute that *Empire* is a musical dramatic television series. However, there is conflicting evidence as to where it is "set," there is no evidence submitted by Fox that it is based on a "fictional" company (and there is evidence to the contrary including statements from Fox that it is based on individuals and events from the real world music industry), and the company is actually called "Empire"

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Entantainment "though it is also reformed
4		Entertainment," though it is also referred
5		to in the series as "Empire Enterprises"
6		and generally just as "Empire" in
7		connection with the series and the sale
8		of music.
9		
10		Fox's Evidence:
		• Bywater Decl. ¶ 2
11		• Ryan Decl. ¶ 2
12		• Defendant's Answer to Complaint,
13		attached to Lens Decl. as Ex. 3 at p.
14		37 ¶ 10; p. 38 ¶ 23
15		Defendant's Counterclaims, attached
16		to Lens Decl. as Ex. 4 at p. 54 ¶ 20
17		DVDs of <i>Empire</i> , lodged with Court
18		as Exs. 11 & 13 to Lens Decl.,
19		passim, including, e.g., Season 1,
20		Episode 1 at 2:57 (Statue of Liberty);
21		Season 1, Episode 2 at 47:53-57
22		(Lucious Lyon's New York license
23		plate and Statue of Liberty); Season
24		1, Episode 4 at 36:06 (announcement
25		for event in NYC at Leviticus, the
26		club owned by Empire Enterprises)
27		Blazek Decl. ¶ 2
28		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Defendant's Evidence:
4		DVDs of <i>Empire</i> , lodged with Court
5		as Ex. 11 to Lens Decl. including
6		Season 1 Pilot at 6:31-6:39 ("I am
7		proud to announce that <b>Empire</b>
8		Entertainment has filed to become a
9		publicly traded company on the New
10		York Stock Exchange."); 45:16-25
11		("Ladies and gentlemen, it is my
12		great honor to welcome back the
13		heart and soul of <b>Empire</b>
14		Enterprises, Ms. Cookie Lyon";
15		45:16-25; 7:15-7:20 ("Your brother
16		and I have been working hard to turn
17		Empire into a publicly traded
18		company"; 9:20-9:22 (reference to
19		"Empire"); 27:32-34 (reference to
20		"Empire"); 45:55 (reference to
21		"Empire"); see also signage, symbols
22		and labels reflecting the name
23		"Empire" throughout series; 33:16-
24		33:23 ("You're so pure only a couple
25		hundred white kids in Brooklyn and
26		San Francisco even know your
27		stuff.")
28		FOX'S REPLY STATEMENT OF

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	PACIS	
4		• Ryan Decl. ¶ 6 (various logos
		reflecting use of the standalone name
5		"Empire")
6		• Bowler Decl., ¶ 4, Ex. 69 (Bywater
7		Deposition Transcript) at 48:22-25,
8		49:3-5, 71:22-24, 72:5-7, 72:9-10,
9		72:14, 72:24-13, 73:16-18, 73:23-
10		74:17, 75:18-24, 83:25-84:7, 84:11-
11		21; 89:10-25, 90:1, 90:8-14, 91:2-3,
12		91:6-7, 91:10-17, 92:4-7, 92:10-19;
13		93:1-11; Bywater Exs. 6, 7.
14		
15		FOX'S OBJECTIONS
16		Relevance. Fed. R. Evid. 401.
17		Test values 1 est 10 Eviat 1011
18		FOX'S REPLY
19		Defendant's response is immaterial.
20		First, defendant does not dispute the fact
21		that <i>Empire</i> is a musical dramatic
22		television series. Second, defendant's
23		cited evidence (dialogue stating,
24		
25		"You're so pure only a couple hundred
26		white kids in Brooklyn and San
27		Francisco even know your stuff.") does
28		not dispute the fact that the series is set
20		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		in New York. Third, the cited Bywater
4		testimony about efforts to make the
5		fictional world <i>seem</i> realistic does not
6		dispute the fact that the show, its
7		characters, and the company are
8		fictional. In fact, defendant's own
9		evidence demonstrates that <i>Empire</i> tells
10		the story of a fictional company. See
11		Shami Decl. ¶ 94 ( <i>Empire</i> storylines are
12		"fictional" events); Julien Decl. ¶ 26
13		(referring to "fictional 'Empire'"
14		company). Finally, defendant's citation
15		to logos containing the name of the <i>show</i>
16		does not dispute the fact that the name of
17		the <i>fictional company</i> is Empire
18		Enterprises.
19		
20	2. In <i>Empire</i> , when drug-dealer-	Defendant's Response:
21	turned-music-mogul Lucious Lyon	Objection/Disputed in part.
22	(played by played by Academy Award-	EMPIRE objects to this statement on the
23	nominee Terrence Howard) is diagnosed	following grounds:
24	with a fatal disease, his ex-wife, Cookie	(1) Improper citations in violation of the
25	(played by Academy Award-nominee	Court's Scheduling Order dated July 23,
26	Taraji P. Henson), and their three sons	2015 stating that "[n]o party should
27	fight for future control over Lucious'	submit any evidence other than the
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	entertainment company.	specific items of evidence or testimony
4		necessary to support or controvert a
5		proposed statement of undisputed fact
6		" (Scheduling Order, p.4:12-17.)
7		(2) Lacks foundation.
8		(3) Hearsay.
9		(4) Lacks authentication.
10		Subject to these objections, EMPIRE
11		does not dispute that Lucious Lyon is
12		played by Terrence Howard and that
13		Cookie Lyon is played by Taraji
14		Henson, or that Lucious Lyon is a "drug
15		dealer-turned-music mogul." However,
16		that is a not a complete description of
17		Lucious Lyon's character as he is also a
18		murderer, felon, homophobic and child
19		abuser.
20		
21		Fox's Evidence:
22		• Cover of DVD set of <i>Empire: The</i>
23		Complete First Season, attached to
24		Lens Decl. as Ex. 10 at p. 135
25		DVDs of <i>Empire</i> , lodged with Court
26		as Exs. 11 & 13 to Lens Decl.,
27		passim
28		FOX'S REPLY STATEMENT OF

1	FOX'S UNCONTROVERTED	SUPPORTING EVIDENCE
2	FACTS	SOIT ORTING EVIDENCE
3		Blazek Decl. ¶ 2
4		• February 16, 2015 Letter From
5		Defendant's Counsel To Fox
6		(Exhibit A to Fox's Complaint),
7		attached to Lens Decl. as Ex. 2 at p.
8		23.
9		
10		<b>Defendant's Evidence:</b>
11		DVDs of <i>Empire</i> , lodged with Court
12		as Ex. 11 to Lens Decl. including
13		Season 1 Pilot at 42:00-43:15
14		(murder scene); 31:18-31:50 (scene
15		of Lucious throwing his young gay
16		child in garbage can); 44:33-45:02
17		("You really aren't ashamed of [gay
18		son Jamal] I'm gonna show you a
19		faggot really can run this company."
20		
21		FOX'S REPLY
22		Defendant's response is immaterial.
23		Defendant's evidence does not dispute
24		the fact that the show concerns a
25		family's fight for future control over
26		Lucious Lyon's entertainment company
27		(a figurative empire). In fact, these
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		scenes only serve to highlight the
4		dramatic and high-stakes fictional fight
5		for the empire.
6	3. The fictional Empire Enterprises	<b>Defendant's Response:</b>
7	produces hip-hop and R&B hits, owns a	Objection/Disputed in part.
8	nightclub, makes champagne and	EMPIRE objects to this statement on the
9	sneakers, and generates hundreds of	following grounds:
10	millions of dollars in annual revenue.	(1) Lacks foundation.
11		(2) Hearsay.
12		(3) Lacks authentication.
13		Subject to these objections, EMPIRE
14		disputes this statement to the extent it
15		refers to the "fictional Empire
16		Enterprises". There is no evidence
17		submitted by Fox that it is based on a
18		"fictional" company and there is
19		evidence to the contrary including
20		statements from Fox that it is based on
21		individuals and events from the real
22		world music industry. Moreover, the
23		company is actually called "Empire
24		Entertainment," though it is also referred
25		to in the series as "Empire Enterprises"
26		and generally just as "Empire" in
27		connection with the series and the sale
28		FOX'S REPLY STATEMENT OF

1	EOVIC LINCONTROVEDTED	CUDDODTING EVIDENCE
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		of music.
4		
5		Fox's Evidence:
6		DVDs of <i>Empire</i> , lodged with Court
7		as Exs. 11 & 13 to Lens Decl.,
8		passim, including, e.g., Season 1,
9		Episode 2 at 34:56 (nightclub);
10		Season 1, Episode 8 at 28:46
11		(champagne); Season 1, Episode 2 at
12		1:38 (sneakers); Season 1, Episode 9
13		at 31:59 (revenue)
14		• Blazek Decl. ¶ 2
15		
16		<b>Defendant's Evidence:</b>
17		DVDs of <i>Empire</i> , lodged with Court
18		as Ex. 11 to Lens Decl. including
19		Season 1 Pilot at 6:31-6:39 ("I am
20		proud to announce that <b>Empire</b>
21		Entertainment has filed to become
22		a publicly traded company on the
23		New York Stock Exchange.");
24		45:16-25 ("Ladies and gentlemen, it
25		is my great honor to welcome back
26		the heart and soul of <b>Empire</b>
27		Enterprises, Ms. Cookie Lyon";
28		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		45:16-25; 7:15-7:20 ("Your brother
4		and I have been working hard to turn
5		Empire into a publicly traded
6		company"; 9:20-9:22 (reference to
7		"Empire"); 27:32-34 (reference to
8		"Empire"); 45:55 (reference to
9		"Empire"); see also signage,
10		symbols and labels reflecting the
11		name "Empire" throughout series;
12		33:16-33:23 ("You're so pure only a
13		couple hundred white kids in
14		Brooklyn and <b>San Francisco</b> even
15		know your stuff.")
16		• Ryan Decl. ¶ 6 (various logos
17		reflecting use of the standalone name
18		"Empire")
19		• Bowler Decl., ¶ 4, Ex. 69 (Bywater
20		Deposition Transcript) at 48:22-25,
21		49:3-5, 71:22-24, 72:5-7, 72:9-10,
22		72:14, 72:24-13, 73:16-18, 73:23-
23		74:17, 75:18-24, 83:25-84:7, 84:11-
24		21; 89:10-25, 90:1, 90:8-14, 91:2-3,
25		91:6-7, 91:10-17, 92:4-7, 92:10-19;
26		93:1-11; Bywater Exs. 6, 7.
27		
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		FOX'S OBJECTIONS
4		Relevance. Fed. R. Evid. 401.
5		
6		FOX'S REPLY
7		Defendant's response is immaterial.
8		First, defendant does not dispute the fact
9		that the company in the series produces
10		hip-hop and R&B hits, owns a nightclub,
11		makes champagne and sneakers, and
12		generates hundreds of millions of dollars
13		in annual revenue. Second, the cited
14		Bywater testimony about efforts to make
15		the fictional world <i>seem</i> realistic does
16		not dispute the fact that the show, its
17		characters, and the company are
18		fictional. In fact, defendant's own
19		evidence demonstrates that <i>Empire</i> tells
20		the story of a fictional company. See
21		Shami Decl. ¶ 94 ( <i>Empire</i> storylines are
22		"fictional" events); Julien Decl. ¶ 26
23		(referring to "fictional 'Empire"
24		company). Third, defendant's citation to
25		logos containing the name of the <i>show</i>
26		does not dispute the fact that the name of
27		the fictional company is Empire
28		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Enterprises.
5	4. <i>Empire</i> features songs in each	Undisputed.
6	episode, including original songs	
7	produced by Timothy "Timbaland"	
8	Mosley.	
9	5. The Soundtracks comprise songs	<b>Defendant's Response:</b>
10	that appear in <i>Empire</i> .	Objection/Undisputed in part.
11		EMPIRE objects to this statement on the
12		following grounds:
13		(1) Vague and ambiguous as to the term
14		"Soundtracks" in this context.
15		(2) Lacks foundation.
16		Subject to these objections, and with the
17		understanding that the term
18		"Soundtracks" only refers to the two
19		compilation CDs released by Fox (and
20		not all other singles and EPs), Empire
21		does not dispute that the Original
22		Soundtrack from Season 1 and the
23		Original Soundtrack Season 2 include
24		songs that appear in the <i>Empire</i> series.
25		
26		Fox's Evidence:
27		Bywater Decl. ¶¶ 2-3

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		• Ross Decl. ¶¶ 2-5
4		Defendant's Answer to Complaint,
5		attached to Lens Decl. as Ex. 3 at p.
6		38 ¶ 23
7		"
8		FOX'S REPLY
9		Defendant's response is immaterial.
10		Defendant does not dispute the fact that
11		the two compilation CDs (Empire:
12		Original Soundtrack From Season 1 and
13		Empire: Original Soundtrack Season 2
14		Volume 1) comprise songs that appear in
15		Empire. Fox used "Soundtracks"
16		consistent with its use in its Motion For
17		Summary Judgment. Motion at 1:5-7
18		("The musical soundtracks for the show
19		bear the name of the show and
20		contain original music tied directly to
21		the show's plot."). Singles and EPs fit
22		within this description. Accordingly,
23		defendant cites no evidence disputing
24		the fact the singles and EPs also
25		appeared in <i>Empire</i> .
26	6. Defendant has not alleged in the	<b>Defendant's Response</b> :
27	Counterclaims that Fox has made any	Objection/Disputed.
28		

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	statements explicitly misleading	EMPIRE objects to this statement on the
4	consumers as to the source of <i>Empire</i> or	following grounds:
5	the Soundtracks.	(1) This is not a statement of fact as
6		required by Local Rule 56-1 and this
7		Court's Scheduling Order dated July 23,
8		2015 (Dkt. 23, p.3 ¶5.)
9		(2) Irrelevant.
10		(3) Argumentative.
11		(4) Lacks foundation.
12		Subject to these objections, EMPIRE
13		disputes this statement as there are
14		numerous such allegations in the
15		Counterclaims. Moreover, Fox's
16		citation to the alleged absence of
17		allegations in the Counterclaims is an
18		improper attempt to circumvent all of
19		the relevant evidence that has been
20		provided to Fox in discovery as set forth
21		in EMPIRE's additional undisputed facts
22		below.
23		
24		Fox's Evidence:
25		Defendant's Counterclaims, attached
26		to Lens Decl. as Ex. 4 at pp. 47-71
27		
28		FOX'S REPLY STATEMENT OF

FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
	Defendant's Evidence:
	• EMPIRE's Counterclaims, Lens
	Decl., Ex. 4 ¶¶ 1, 20, 21, 22, 23, 32,
	38, 45, 51, 53, 60, and 61.
	FOX'S REPLY
	Defendant's response is immaterial.
	Defendant's citations to its
	Counterclaims, most of which reference
	Fox's use of its <i>Empire</i> mark, confirm
	the fact that defendant has not alleged
	that Fox has made statements explicitly
	misleading consumers as to the source
	of <i>Empire</i> or the Soundtracks.
7 Foy's maduate do not contain any	Defendent's Despenses
	<u>Defendant's Response</u> : Objection/Disputed
	Objection/Disputed.
Distribution's endorsement or affiliation.	EMPIRE objects to this statement on the
	following grounds:
	(1) Vague and ambiguous as to the terms
	"Fox's products", and "endorsement or
	affiliation."
	(2) Improper citations in violation of the
	Court's Scheduling Order dated July 23,
	2015 stating that "[n]o party should

.		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		submit any evidence other than the
4		specific items of evidence or testimony
5		necessary to support or controvert a
6		proposed statement of undisputed fact
7		" (Scheduling Order, p.4:12-17.)
8		(3) Lacks foundation.
9		(4) Hearsay.
10		(5) Irrelevant.
11		Subject to these objections, EMPIRE
12		disputes this statement as EMPIRE
13		contends that Fox's use of the "Empire"
14		mark in connection with all goods and
15		services promoted, advertised, marketed,
16		distributed and sold in connection with
17		the <i>Empire</i> series and <i>Empire</i> series
18		music (including, but not limited to,
19		DVDs, CDs, singles, digital extended
20		plays ("EPs"), apparel and accessories)
21		misleads and confuses consumers as to
22		the endorsement or affiliation of such
23		goods and services.
24		
25		Fox's Evidence:
26		DVDs of <i>Empire</i> , lodged with Court
27		as Exs. 11 & 13 to Lens Decl.,
28		EOV'S DEDI V STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		passim
4		Blazek Decl. ¶ 2
5		CDs of Soundtracks, lodged with
6		Court as Exs. 15 & 17 to Lens Decl.,
7		passim
8		• Cover of DVD set of <i>Empire</i> : <i>The</i>
9		Complete First Season, attached to
10		Lens Decl. as Ex. 10 at p. 135
11		• Covers of albums <i>Empire: Original</i>
12		Soundtrack From Season 1 and
13		Empire: Original Soundtrack Season
14		2 Volume 1, attached to Lens Decl.
15		as Exs. 14 & 16 at pp. 143, 145
16		Amazon.com sales pages for
17		Empire: Music From The Pilot and
18		Empire: Music From A Man Sinned
19		Against, attached to Lens Decl. ¶¶
20		17-18 as Exs. 18-19 at pp. 147-50
21		Ryan Decl. ¶ 6
22		
23		<b>Defendant's Evidence:</b>
24		• Shami Decl., ¶¶ 84, 92, 93, 94, 100,
25		114; Simon Decl. ¶¶ 2-3; Bowler
26		Decl., ¶ 8, Ex. 73 (Expert Report of
27		Dr. Kristen J. Lieb) at ¶3, 34-45, 48;
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		McDaniels Decl. ¶¶ 15-17; Douthit
4		Decl. ¶¶ 14; Julien Decl. ¶¶ 22-26
5		
6		FOX'S OBJECTIONS
7		Relevance. Fed. R. Evid. 401. Lack of
8		personal knowledge. Fed. R. Evid. 602.
9		Impermissible opinion testimony. Fed.
10		R. Evid. 701. Impermissible legal
11		conclusion. Fed. R. Evid. 701.
12		Improper bases for expert opinion. Fed.
13		R. Evid. 703. Speculation.
14		
15		FOX'S REPLY
16		Defendant's response is immaterial.
17		Defendant's evidence of alleged or
18		purported actual or potential confusion
19		does not dispute the fact that Fox's
20		products do not contain any
21		representation as to Empire
22		Distribution's endorsement or affiliation.
23		Further, paragraph 100 of the Shami
24		declaration misstates evidence in exhibit
25		7. Mr. Shami speculates that "[i]t is not
26		clear to consumers viewing these pages
27		that EMPIRE and Fox's Empire are
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		distinct entities." However, many of the
4		tweet authors appear to distinguish
5		between defendant and <i>Empire</i> . For
6		example, the tweet of "Risto Smith" on
7		the fifth page of Exhibit 7 (Fox cannot
8		point the Court to a page number of the
9		exhibit since defendant failed to
10		consecutively paginate exhibits in
11		accordance with L.R. 11-5.2) appears to
12		be trying to sell the "empire.hiphop"
13		internet domain name to different
14		"empire" entities the user knows are
15		distinct, including defendant, Empire,
16		Empire Magazine, and Beats Empire.
17	Likelihood o	f Confusion
18	8. Defendant is a music record label	<b>Defendant's Response:</b>
19	and music distribution company.	Undisputed in part.
20		EMPIRE does not dispute that it is a
21		music record label and music
22		distribution company, but that is not a
23		complete description of its business.
24		EMPIRE is a full-service music
25		company under the umbrella brand name
26		"EMPIRE" which includes "EMPIRE
27		Distribution" (which provides
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		distribution goods and services),
4		"EMPIRE Recordings" (which offers
5		recording goods and services), and
6		"EMPIRE Publishing" (which provides
7		publishing goods and services).
8		(Shami Decl., ¶¶ 6-21)
9		
10		Fox' Evidence:
11		Defendant's Counterclaims, attached
12		to Lens Decl. as Ex. 4 at p. 50 ¶ 9
13		
14		FOX'S REPLY
15		Defendant does not dispute this
16		uncontroverted fact.
17	9. Defendant does not allege in its	<b>Defendant's Response</b> :
18	Counterclaims that it produces broadcast	Objection/Disputed.
19	television programming or that it intends	EMPIRE objects to this statement on the
20	to expand into broadcast television	following grounds:
21	programming.	(1) This is not a statement of material
22		fact as required by Local Rule 56-1 and
23		this Court's Scheduling Order dated July
24		23, 2015 (Dkt. 23, p.3 ¶5).
25		(2) Irrelevant.
26		(3) Argumentative.
27		(4) Lacks foundation.
28		POWIG DEDI W GELATENTE OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		(5) Vague and ambiguous as to the term
4		"broadcast television programming".
5		Subject to these objections, EMPIRE
6		disputes this statement in that EMPIRE
7		has been involved in broadcast
8		television programming and intends to
9		expand into broadcast television
10		programming.
11		
12		Fox's Evidence:
13		Defendant's Counterclaims, attached
14		to Lens Decl. as Ex. 4 at pp. 47-71
15		
16		<b>Defendant's Evidence:</b>
17		• Shami Decl. ¶¶ 136-141
18		
19		FOX'S OBJECTIONS
20		Relevance. Fed. R. Evid. 401.
21		Impermissible opinion testimony. Fed.
22		R. Evid. 701. Impermissible legal
23		conclusion. Fed. R. Evid. 701.
24		
25		FOX'S REPLY
26		Defendant's response is immaterial.
27		Defendant's evidence does not dispute
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		the fact that it does not produce
4		broadcast television programming. The
5		networks described in paragraph 139 of
6		the Shami Declaration are <i>not</i> broadcast
7		television networks. Further, the
8		appearance of an individual on a non-
9		broadcast television network does not
10		constitute producing broadcast television
11		programming. Finally, while defendant
12		plans to advertise and have artists appear
13		on television programs, defendant has
14		demonstrated no intention to develop or
15		produce broadcast television
16		programming itself.
17 18	10. Defendant claims the rights to	Defendant's Response:
19	three marks, none of which is federally	Objection/Disputed.
20	registered: "Empire," the application for	EMPIRE objects to this statement on the
21	which was submitted in April 2015, and	following grounds:
22	"Empire Recordings" and "Empire	(1) Lacks foundation.
23	Distribution," the applications for which	(2) Hearsay.
24	were submitted in December 2014, after	(3) Lacks authentication.
25	Fox announced on November 19, 2014	Subject to these objections, EMPIRE
26	the forthcoming premiere of <i>Empire</i> .	disputes this statement. Contrary to
27		Fox's statement, EMPIRE applied for

4		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		federal registration of the "EMPIRE
4		DISTRIBUTION" and "EMPIRE
5		RECORDINGS" marks on January 24,
6		2014, before Fox announced the
7		premiere of <i>Empire</i> . Moreover, contrary
8		to Fox's statement, the USPTO has
9		approved the following five EMPIRE
10		trademark applications, and will be
11		publishing same on January 19, 2016:
12		(1) EMPIRE DISTRIBUTION (Serial
13		No. 86174484); (2) EMPIRE
14		DISTRIBUTION (Serial No.
15		86477123); (3) EMPIRE (Serial No.
16		86174393); (4) EMPIRE (Serial No.
17		86590415); and (5) EMPIRE (Serial No.
18		86590385).
19		
20		Fox's Evidence:
21		Compare Fox's Complaint, attached
22		to Lens Decl. as Ex. 2 at p. 11 ¶ 14-
23		16 with Defendant's Answer to
24		Complaint, attached to Lens Decl. as
25		Ex. 3 at p. 37 ¶¶ 14-16
26		• Reynolds Decl. ¶¶ 8-14
27		• Ryan Decl. ¶ 2
28		FOX'S REPLY STATEMENT OF

1	FOX'S UNCONTROVERTED	SUPPORTING EVIDENCE
2	FACTS	
3		
4		<b>Defendant's Evidence:</b>
5		• Hobbs Decl. ¶ 4-9, Ex. 1.
6		
7		FOX'S OBJECTIONS
8		Relevance. Fed. R. Evid. 401. Lack of
9		personal knowledge. Fed. R. Evid. 602.
10		Impermissible legal conclusion. Fed. R.
11		Evid. 701.
12		
13		FOX'S REPLY
14		Defendant's response is immaterial.
15		Defendant does not dispute the fact that
16		none of its marks are federally
17		registered. As defendant admits, its
18		marks have not even been published in
19		the Official Gazette, a prerequisite to
20		federal registration that gives the public
21		the chance to oppose federal registration.
22		Defendant further does not dispute the
23		fact that its application for "Empire" was
24		submitted in April 2015.
25	11. The USPTO has over 650	Defendant's Response:
26	registered or pending applications for	Objection/Disputed.
27	registered of pending applications for	Objection Disputed:

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	"empire" related marks.	EMPIRE objects to this statement on the
4		following grounds:
5		(1) Lacks foundation.
6		(2) Hearsay.
7		(3) Lacks authentication.
8		Subject to these objections, EMPIRE
9		disputes this statement in that many of
10		the purported "empire" related marks
11		contained in the list submitted by Fox do
12		not contain the word "empire". For
13		example, Fox's list erroneously includes
14		the names: "ACE MEDIA CORP",
15		"TXTPIRE", "IE TREADS", "1494
16		IMPERIO", "IMPERIO", "IMPERIO
17		SALSA", "EMPYRE", "IE", "IMPERIO
18		AJEDREZ", "MPIREBOYZ",
19		"VIGILAR IMPERIO", "IMPERIO
20		DEL TIEMPO", "EDM PIRE
21		APPAREL", "ES", "ESRT", "ESG",
22		"E.", "AURUM IMPERIUM",
23		"IMPERIO DOS ACORES", "YKE",
24		"MPIRE", "IMPIRE", "EPC",
25		"SHRIMP IMPERIO", "TEIKOKU
26		PHARMA USA", "ANTIGUO
27		IMPERIO", "IESHINEON.COM",
28		FOUR DEDICE OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		"IEHP MEDICARE DUALCHOICE",
4		and "FEMPIRE", among others.
5		
6		Fox's Evidence:
7		• Empire Search Results from USPTO,
8		attached to Reynolds Decl. ¶ 2 as Ex.
9		1 at pp. 10-27.
10		
11		<b>Defendant's Evidence:</b>
12		Empire Search Results from USPTO,
13		Reynolds Decl. ¶ 2 as Ex. 1 at pp.
14		10-27.
15		
16		FOX'S REPLY
17		Defendant's response is immaterial.
18		Many of the marks defendant mentions
19		are, in fact, "empire" related marks.
20		Some are intentional misspellings or
21		plays on the word "empire" (e.g.,
22		"EMPYRE," "MPIREBOYZ") while
23		others are "empire" in a different
24		language (e.g., "imperio" is Spanish for
25		"empire," and "imperium" is Latin for
26		"empire"). Moreover, even excluding
27		all of defendant's examples of names not
28		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		containing the precise word "empire,"
4		there would be over 600 registered or
5		pending applications for "empire"
6		related marks with the USPTO.
7		
8	12. Searches for corporations and	<b>Defendant's Response:</b>
9	limited liability companies/limited	Objection.
10	partnerships on California's Secretary of	EMPIRE objects to this statement on the
11	State website for entity names with the	following grounds:
12	word "empire" generates over 5,000	(1) Lacks foundation.
13	results.	(2) Hearsay.
14		(3) Lacks authentication.
15		
16		Fox's Evidence:
17		Empire Entity Search Results from
18		California Business Searches,
19		attached to Reynolds Decl. ¶¶ 6-7 as
20		Exs. 21-22 at pp. 262-89
21		
22		FOX'S REPLY
23		Defendant does not dispute this
24		uncontroverted fact. Defendant's
25		evidentiary objections are not well
26		taken. See Fox's Response To
27		Defendant's Memorandum Of

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Evidentiary Objections.
4		
5	13. Empire Distribution is not the	Defendant's Response:
6	only record label with the word	Objection.
7	"empire" as part of its name.	EMPIRE objects to this statement on the
8		following grounds:
9		(1) Lacks foundation.
10		(2) Hearsay.
11		(3) Lacks authentication.
12		
13		Fox's Evidence:
14		Empire Music Search Results from
15		USPTO, attached to Reynolds Decl.
16		¶ 3 as Exs. 2-3 at pp. 28-159
17		Empire Record Label Search Results
18		from discogs.com & Label
19		Webpages, attached to Reynolds
20		Decl. ¶ 4 as Exs. 4-11 at pp. 160-231
21		Empire Music Company Internet
22		Search Webpages, attached to
23		Reynolds Decl. ¶ 5 as Exs. 12-20 at
24		pp. 232-61
25		
26		FOX'S REPLY
27		Defendant does not dispute this
28	ıl	

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1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		uncontroverted fact. Defendant's
4		evidentiary objections are not well
5		taken. See Fox's Response To
5		Defendant's Memorandum Of
7		Evidentiary Objections.
3	14. Defendant has admitted this case	<b>Defendant's Response</b> :
)	constitutes its lone trademark	Objection/Undisputed in part.
)	enforcement effort.	EMPIRE objects to this statement on the
-		following grounds:
$^{2}$		(1) Vague and ambiguous as to the term
3		"trademark enforcement effort."
<b>↓</b>		(2) Lacks foundation.
5		Subject to these objections, EMPIRE
5		does not dispute that it has not filed any
		other trademark infringement lawsuits.
6		
		Fox's Evidence:
)		• Defendant's Responses To Fox's
		First Set of Interrogatories, attached
2		to Lens Decl. as Ex. 5 at p. 78
3		(Interrogatory No. 10)
1		
5		FOX'S REPLY
5		Defendant does not dispute this
7		uncontroverted fact. Defendant's
8		

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE	
3		evidentiary objections are not well	
4		taken. See Fox's Response To	
5		Defendant's Memorandum Of	
6		Evidentiary Objections.	
7	15. Fox has never used the name	<b>Defendant's Response:</b>	
8	"Empire Distribution" on or in	Objection.	
9	connection with any of its products.	EMPIRE objects to this statement on the	
10		following grounds:	
11		(1) Improper citations in violation of the	
12		Court's Scheduling Order dated July 23,	
13		2015 stating that "[n]o party should	
14		submit any evidence other than the	
15		specific items of evidence or testimony	
16		necessary to support or controvert a	
17		proposed statement of undisputed fact	
18		" (Scheduling Order, p.4:12-17.)	
19		(2) Lacks foundation.	
20		(3) Hearsay.	
21		(4) Irrelevant.	
22			
23		Fox's Evidence:	
24		DVDs of <i>Empire</i> , lodged with Court	
25		as Exs. 11 & 13 to Lens Decl.,	
26		passim	
27		Blazek Decl. ¶ 2	
28		FOX'S REPLY STATEMENT OF	

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		CDs of Soundtracks, lodged with
4		Court as Exs. 15 & 17 to Lens Decl.,
5		passim
6		• Cover of DVD set of <i>Empire: The</i>
7		Complete First Season, attached to
8		Lens Decl. as Ex. 10 at p. 135
9		• Covers of albums <i>Empire: Original</i>
10		Soundtrack From Season 1 and
11		Empire: Original Soundtrack Season
12		2 Volume 1, attached to Lens Decl.
13		as Exs. 14 & 16 at pp. 143, 145
14		Amazon.com sales pages for <i>Empire</i> :
15		Music From The Pilot and Empire:
16		Music From A Man Sinned Against,
17		attached to Lens Decl. ¶¶ 17-18 as
18		Exs. 18 & 19 at pp. 147-50
19		• Ryan Decl. ¶ 6
20		
21		FOX'S REPLY
22		Defendant does not dispute this
23		uncontroverted fact. Defendant's
24		evidentiary objections are not well
25		taken. See Fox's Response To
26		Defendant's Memorandum Of
27		Evidentiary Objections.
28		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	16. Columbia Records, a division of	<b>Defendant's Response:</b>
4	Sony Music Entertainment, acts as the	Disputed in part.
5	record label for the <i>Empire</i> soundtrack	EMPIRE does not dispute that Fox
6	music and distributes <i>Empire's</i> original	identifies Columbia Records as the
7	songs.	"record label" for the <i>Empire</i> series
8		music, but denies the balance of the
9		request insofar as Fox exercises control
10		over Columbia's release of the music.
11		In fact, Fox omits the relevant portion of
12		paragraphs it cites from the declarations
13		of Bywater and Ross stating that the
14		release of the <i>Empire</i> series music is
15		done only "[w]ith the permission of
16		Fox." (Bywater Decl. ¶ 3, Ross Decl. ¶
17		2.) Moreover, Fox has used the
18		"Empire" name as a source-identifier
19		outside of the construct of the Empire
20		series, including by suggesting, for
21		instance, that "Empire" or "Empire
22		Entertainment" or "Empire Enterprises"
23		is a real-life record label creating and
24		releasing the <i>Empire</i> series music.
25		
26		Fox's Evidence:
27		Bywater Decl. ¶ 3
28		FOX'S REPLY STATEMENT OF

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1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		• Ross Decl. ¶ 2-5
4		Tross Dean    2 c
5		Defendant's Evidence:
6		Bywater Decl. ¶ 3
7		• Ross Decl. ¶ 2
8		<ul> <li>Bowler Decl., ¶ 4, Ex. 69 at 22:3-5,</li> </ul>
9		22:10-18, 22:25-23:1, 23:4-6; 23:8-9,
10		
11		23:14-24:4; 24:8-25:7, 25:11-23,
12		32:23-33:10, 33:14-15, 33:21-34:5,
13		34:9-10, 34:13-14, 34:16-22, 37:22-
14		23, 38:2-10, 38:25-39:5, 39:7-13,
15		39:18-22; 59:4-7, 66:24-67:5, 67:8-
16		21, 70:2-17, 70:21, 85:3-10, 85:14-
17		17, 130:15-17, 130:20-22, 131:4-6;
		132:2-5, 132:14-17, 132:20-24,
18		133:2-5, 133:9-13, 133:15-16,
19		133:20, 133:24-134:1, 134:9-10,
20		134:13-17, 134:20-137:11, 138:8-14,
21		138:17-24; 139:20-140:11; 140:20-
22		141:2; 142:19-143:4; 143:15-20;
23		144:8-17, 145:2-12, 158:5-8, 158:11-
24		21, 163:1-3, 163:10-164:1, 164:5-7,
25		164:11-164:24, 165:15-16, 165:19-
26		21, 167:3-4, 167:7, 208:3-6; 209:15-
27		24, 210:4-5, 210:8-1; Bywater Exs.
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		3, 4, 10, 11, 12, 13, 30.
4		2, 1, 10, 11, 12, 10, 00.
5		FOX'S OBJECTIONS
6		Relevance. Fed. R. Evid. 401. Lack of
7		personal knowledge. Fed. R. Evid. 602.
8		Hearsay. Fed. R. Evid. 801, 802.
9		
10		FOX'S REPLY
11		Defendant's response is immaterial.
12		Defendant's evidence, despite myriad
13		citations, does not dispute the fact that
14		Columbia Records is identified as the
15		record label for the <i>Empire</i> soundtrack
16		and releases the <i>Empire</i> series music.
17		That Columbia Records does so with
18		Fox's permission does not change this
19		fact. While defendant refers to "the
20		balance of the request," it is unclear to
21		which request defendant is referring.
22		Finally, in defendant's many citations,
23		there is no evidence to support its
24		contention that Fox suggests that
25		"Empire," "Empire Entertainment," or
26		"Empire Enterprises" is a real-life record
27		label.
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	PACIS	
4	17. Empire: The Original Soundtrack	<b>Defendant's Response:</b>
5	From Season 1 is released and	Objection.
6	distributed with the album cover shown	EMPIRE objects to this statement on the
7	in Exhibit 2 to the Ross Declaration.	following grounds:
8		(1) Hearsay.
9		(2) Lacks foundation.
10		
11		Fox's Evidence:
12		• Ross Decl. ¶ 4
13		
14		FOX'S REPLY
15		Defendant does not dispute this
16		uncontroverted fact. Defendant's
17		evidentiary objections are not well
18		taken. See Fox's Response To
19		Defendant's Memorandum Of
20		Evidentiary Objections.
21	18. Empire: The Original Soundtrack	<b>Defendant's Response:</b>
22	Season 2 Volume 1 is released and	Objection.
23	distributed with the album cover shown	EMPIRE objects to this statement on the
24	in Exhibit 3 to the Ross Declaration.	following grounds:
25		(1) Hearsay.
26		(2) Lacks foundation.
27		

1	FOY'S LINCONTROVEDTED	CUDDODTING EVIDENCE
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Fox's Evidence:
4		• Ross Decl. ¶ 5
5		
6		FOX'S REPLY
7		Defendant does not dispute this
8		uncontroverted fact. Defendant's
9		evidentiary objections are not well
10		taken. See Fox's Response To
11		Defendant's Memorandum Of
12		Evidentiary Objections.
13	19. Empire: The Original Soundtrack	<b>Defendant's Response:</b>
14	From Season 1 debuted as the number	Objection.
15	one album on the Billboard 200 chart for	EMPIRE objects to this statement on the
16	the week of March 28, 2015.	following grounds:
17		(1) Hearsay.
18		(2) Lacks foundation.
19 20		
20		Fox's Evidence:
22		Billboard Chart for Week of March
23		28, 2015, attached to Ross Decl. ¶ 4
24		as Ex. 1 at p. 3
25		
26		FOX'S REPLY
27		Defendant does not dispute this
28		uncontroverted fact. Defendant's  FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		evidentiary objections are not well
4		taken. See Fox's Response To
5		Defendant's Memorandum Of
6		Evidentiary Objections.
7	20. Fox has sold hundreds of	Undisputed.
8	thousands of units of the music	
9	associated with Empire.	
10	21. Empire's Season 1 finale attracted	Undisputed.
11	more than 16 million same-day viewers.	
12	22. Empire's Season 2 premiere	Undisputed.
13	debuted to an audience of over 20	
14	million viewers.	
15	23. Consumers who purchase	<b>Defendant's Response</b> :
16	soundtracks are generally familiar with	Objection.
17	the underlying show or movie.	EMPIRE objects to this statement on the
18		following grounds:
19		(1) Vague and ambiguous as to the terms
20		"soundtracks", "generally familiar" and
21		"underlying show or movie".
22		(2) Lacks foundation.
23		(3) Hearsay.
24		
25		Fox's Evidence:
26		Report of Ted Cohen, attached to
27		Lens Decl. as Ex. 7 at p. 88
28		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		• Ross Decl. ¶ 3 (approximately 90%
4		of <i>Empire</i> 's digital Soundtrack
5		purchases within seven days of
6		episode airing)
7		
8		FOX'S REPLY
9		Defendant does not dispute this
10		uncontroverted fact. Defendant's
11		evidentiary objections are not well
12		taken. See Fox's Response To
13		Defendant's Memorandum Of
14		Evidentiary Objections.
15	24. Fox uses the marks shown in	Undisputed but incomplete.
16	Figures 2-5 of Complaint; Paragraph 21	EMPIRE does not dispute that Fox uses
17	of defendant's Counterclaims (first	the "EMPIRE" marks depicted in the
18	image); Paragraph 6 of the Declaration	pleadings and declarations cited.
19	of Shannon Ryan; and Exhibits 2-3 of	However, EMPIRE does not agree that
20	the Declaration of Andrew Ross.	these examples encompass all of Fox's
21		uses of the "EMPIRE" marks.
22		
23		Fox's Evidence
24		Compare Fox's Complaint, attached
25		to Lens Decl. as Ex. 2 at pp. 13-14,
26		¶¶ 25-26 with Defendant's Answer to
27		Complaint, attached to Lens Decl. as
28		FOX'S REPLY STATEMENT OF

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$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Ex. 3 at p. 39 ¶¶ 25-26
4		<ul> <li>Defendant's Counterclaims, attached</li> </ul>
5		to Lens Decl. as Ex. 4 at p. 54 ¶ 21
6		(first image)
7		• Ryan Decl. ¶ 6
8		<ul> <li>Amazon.com sales pages for Empire:</li> </ul>
9		Original Soundtrack From Season 1
10		and Empire: Original Soundtrack
11		Season 2, Volume 1, attached to
12		Ross Decl. ¶¶ 4-5 as Exs. 2 & 3 at
13		pp. 5-11
14		рр. 3-11
15		FOX'S REPLY
16		Defendant's response is immaterial.
17		Defendant does not dispute this
18		uncontroverted fact and further provides
19		no examples of any additional marks
20		used by Fox.
21	25. Fox's <i>Empire</i> marks are generally	Defendant's Response:
22	accompanied by the Fox house mark	Objection/Disputed.
23	and/or well-known elements from the	EMPIRE objects to this statement on the
24	show.	following grounds:
25		(1) Vague and ambiguous as to the
26		terms "generally accompanied," "Fox
27		house mark", and "well-known elements
28		FOX'S REPLY STATEMENT OF

1		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		from the show."
4		
5		(2) Lacks foundation.
6		(3) Hearsay.
7		Subject to these objections, EMPIRE
8		disputes this assertion. In fact, Shannon
9		Ryan contradicts this assertion in
		paragraph 6 of her declaration as several
10		of the "EMPIRE" logos she references
11		are standalone "EMPIRE" logos without
12		any reference to Fox or the Empire
13		series.
14		
15		Fox's Evidence:
16		• Ryan Decl. ¶ 5
17		
18		Defendant's Evidence:
19		• Ryan Decl. ¶ 6 Fig. 2, Fig. 6 & Fig. 7
20		J
21		FOX'S REPLY
22		Defendant's response is immaterial. The
23		Shannon Ryan declaration does not
24		contradict Fox's assertion that Fox's
25		
26		Empire marks are generally
27		accompanied by the Fox house mark
28		and/or well-known elements from the
28		FOX'S REPLY STATEMENT OF

1		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		show (e.g., cast members). In fact, in
4		paragraph 6 of the Ryan declaration, the
5		majority of the marks contain either the
6		Fox house mark or well-known elements
7		from the show. Defendant incorrectly
8		cites Figure 2 and Figure 6 as examples
9		of marks that do not have a Fox house
10		mark or well-known elements from the
11		show. Figure 2 features a golden record
12		within the word "Empire," while Figure
13		6 features "show-business"-type lights
14		behind the word "Empire." Both
15		graphic elements were pervasive parts of
16		the <i>Empire</i> launch campaign.
17		are Empire manen campaign
18	26. Fox has spent millions of dollars	Defendant's Response:
19	to advertise and promote <i>Empire</i> and the	Objection.
20	Soundtracks.	EMPIRE objects to this statement on the
21		following grounds:
22		(1) Vague and ambigious as to the term
23		"the Soundtracks."
24		(2) Lacks foundation.
25		(2) Zuono roundution.
26		Fox's Evidence:
27		• Ryan Decl. ¶ 2
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Defendant's Responses to Fox's First
4		Set of Interrogatories, attached to
5		Lens Decl. as Ex. 5 at p. 74
6		(Interrogatory No. 6)
7		
8		FOX'S REPLY
9		Defendant does not dispute this
10		uncontroverted fact. Defendant's
11		evidentiary objections are not well
12		taken. See Fox's Response To
13		Defendant's Memorandum Of
14		Evidentiary Objections.
15	27. The necklace depicted in	Objection/Undisputed in part.
16	Paragraph 22 of Empire Distribution's	EMPIRE objects to this statement on the
17	Counterclaims was used as a prop on the	following grounds:
18	show and was not offered for sale.	(1) Lacks foundation.
19		(2) Hearsay.
20		(3) Irrelevant.
21		Subject to these objections, EMPIRE
22		does not dispute that the necklace may
23		have been used as a prop on the Empire
24		show but disputes that it was used
25		exclusively as a prop on the show. In
26		fact, Fox spent considerable time and
27		effort promoting the necklace and city
28		

1		
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		1 1' 1' TD '' T
4		skyline graphic on Twitter, Instagram
5		and other social media.
6		
7		Fox's Evidence
8		• Raftery Decl. ¶ 2
9		
10		FOX'S REPLY
		Defendant's response is immaterial.
11		Defendant does not dispute the fact that
12		the necklace was used as a prop on the
13		show and not offered for sale. Further,
14		defendant cites no evidence to support
15		its assertion that "Fox spent considerable
16		time and effort promoting the necklace
17		and city skyline graphic on Twitter,
18		Instagram, and other social media."
19	28. Defendant uses the logos	Undisputed but incomplete.
20	identified in Paragraphs 16, 17, 18, 21	EMPIRE does not dispute that it uses the
21	and 22 of its Counterclaims.	logos identified in paragraphs 16, 17, 18,
22		21 and 22. However, EMPIRE disputes
23		that those are the only logos it has used.
24		(Shami Decl., ¶ 35.)
25		
26		Fox's Evidence:
27		Defendant's Counterclaims, attached
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		to Lens Decl. as Ex. 4 at pp. 52-55 ¶¶
4		16-18, 21-22
5		
6		FOX'S REPLY
7		Defendant does not dispute this
8		uncontroverted fact.
9	29. Defendant alleges shared use of	<b>Defendant's Response</b> :
10	"online stores such as iTunes, Google	Objection/Disputed.
11	Play, Amazon.com, and Spotify" but	EMPIRE objects to this statement on the
12	does not allege in its Counterclaims that	following grounds:
13	it advertises its marks on television,	(1) This is not a statement of fact as
14	billboards, or print media.	required by Local Rule 56-1 and this
15		Court's Scheduling Order dated July 23,
16		2015 (Dkt. 23, p.3 ¶5.)
17		(2) Irrelevant.
18		(3) Argumentative.
19		Subject to these objections, EMPIRE
20		disputes this assertion as there are
21		multiple such allegations (general and
22		specific) in the Counterclaims.
23		
24		Fox's Evidence:
25		Defendant's Counterclaims, attached
26		to Lens Decl. as Ex. 4 at p. 55 ¶ 23;
27		pp. 47-71
28		

1		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	212020	
4		<b>Defendant's Evidence:</b>
5		EMPIRE's Counterclaims, Lens
6		Decl., Ex. 4 at ¶¶ 9 ("Empire
7		" · ·
8		promotes, markets and sells its music
9		through various channels of
10		commerce"), 10 ("sponsored sold-
11		out showcases under its name at
12		events such as South by Southwest"),
13		14 ("The Marks have been used
14		prominently in press releases and
15		coverage of those records"), 15 ("the
		Marks have been the subject of broad
16		advertising and promotional
17		campaigns, leading to a prominent
18		presence, both online and offline"),
19		16 ("one of Empire's Marks was
20		promoted in person at the A3C
21		hip hop festival"), 18 (poster at
22		televised BET awards).
23		
24		FOX'S OBJECTIONS
25		Relevance. Fed. R. Evid. 401.
26		
27		FOX'S REPLY
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Defendant's response is immaterial.
4		Defendant's evidence does not dispute
5		this uncontroverted fact as none of its
6		citations to its Counterclaims
7		demonstrate its advertising on television,
8		billboards, or print media.
9	20 D.C. 1	Defendent Demonstration
10	30. Defendant's examples of its	<u>Defendant's Response</u> :
11	"Marks [being] promoted online" are	Disputed in part.
12	Instagram posts by its CEO, Ghazi	EMPIRE does not dispute that one
13	Shami, with the posting in Paragraph 16	example in its Counterclaims of its
14	receiving 25 likes.	marks being promoted online included a
15		post in October 2012 by EMPIRE's
16		CEO Ghazi Shami which, at the time of
17		the screenshot, had received 25 "likes."
18		However, EMPIRE disputes that is the
19		only example of online promotion of
20		EMPIRE's marks provided in the
21		Counterclaims including multiple other
22		Instagram posts that received many
23		hundreds of "likes", online promotion on
24		EMPIRE's websites http://empi.re and
25		www.empiredistribution.com, and
26		promotion in online stores including
27		iTunes, Google Play, Amazon.com, and

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Spotify.
4		Spoiny.
5		Fox's Evidence:
6		
7		Defendant's Counterclaims, attached     The First Art Section 52,52,53
8		to Lens Decl. as Ex. 4 at pp. 52-53 ¶¶
9		16-18
10		
11		<b>Defendant's Evidence:</b>
12		EMPIRE's Counterclaims, Lens
		Decl., Ex. 4 at ¶¶ 9, 17, 18, 23, 26,
13		29
14		
15		FOX'S REPLY
16		Defendant's response is immaterial.
17		Defendant does not dispute the fact that
18		its Counterclaims include Instagram
19		posts by its CEO, Ghazi Shami, as
20		examples of its marks being promoted
21		online. Paragraph 9 of the
22		Counterclaims does not show examples
23		of defendant's marks being promoted
24		online, and paragraphs 17 and 18 show
25		Instagram posts from defendant's CEO,
26		Ghazi Shami. The evidence from
27		paragraphs 23, 26, and 29 of the
28		FOX'S REPLY STATEMENT OF

_		
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	FOX'S UNCONTROVERTED	SUPPORTING EVIDENCE
3	FACTS	
		Counterclaims do not show defendant
4		promoting its marks online. Paragraph
5		23 references defendant's music in
6		online stores like iTunes, Google Play,
7		Amazon.com, and Spotify, but none of
8		the images from these online stores
9		include defendant's marks. Paragraph
10		26 shows an Instagram post by an
11		alleged artist of defendant that similarly
12		fails to include defendant's marks.
13		Paragraph 29 shows an Instagram post
14		by Shaggy, not promotion by defendant.
15		, , , , , , , , , , , , , , , , , , , ,
16	31. As of the date of filing, Ghazi	<b>Defendant's Response:</b>
17	Shami's Instagram account has fewer	Objection.
18	than 5,000 followers.	EMPIRE objects to this statement on the
19		following grounds:
20		(1) Lacks foundation.
21		(2) Hearsay.
22		
23		Fox's Evidence:
24		• Lens Decl. ¶ 20
25		
26		FOX'S REPLY
27		Defendant does not dispute this
- '		-

.		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		uncontroverted fact. Defendant's
4		evidentiary objections are not well
5		taken. See Fox's Response To
5		Defendant's Memorandum Of
7		Evidentiary Objections.
32	2. As of the date of filing, Empire	<b>Defendant's Response:</b>
III	istribution's Instagram account has	Objection.
III ~	pproximately 6,000 followers.	EMPIRE objects to this statement on the
-		following grounds:
2		(1) Lacks foundation.
		(2) Hearsay.
-		
5		Fox's Evidence:
<b>5</b>		• Lens Decl. ¶ 20
3		FOX'S REPLY
`		Defendant does not dispute this
)		uncontroverted fact. Defendant's
		evidentiary objections are not well
2		taken. See Fox's Response To
3		Defendant's Memorandum Of
٠    <u></u>		Evidentiary Objections.
33	3. As of the date of filing, Fox's	<b>Defendant's Response</b> :
111	mpire Instagram account has over 1.6	Objection.
	illion followers.	EMPIRE objects to this statement on the
8		FOX'S REPLY STATEMENT OF

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		following grounds:
4		(1) Lacks foundation.
5		(2) Hearsay.
6		•
7		Fox's Evidence:
8		• Lens Decl. ¶ 20
9		
10		FOX'S REPLY
11		Defendant does not dispute this
12		uncontroverted fact. Defendant's
13		evidentiary objections are not well
14		taken. See Fox's Response To
15		Defendant's Memorandum Of
16		Evidentiary Objections.
17	34. The screenshots of albums in	<b>Defendant's Response:</b>
18	Paragraph 23 of defendant's	Disputed.
19	Counterclaims do not show defendant's	The first screenshot in paragraph 23 of
20	marks; defendant highlighted the albums	EMPIRE's Counterclaims (on the
21	it released.	bottom of page 9) shows EMPIRE's
22		marks including the marks "EMPIRE
23		Distribution" and "EMPIRE". The other
24		screenshots in paragraph 23 (pages 10,
25		11 and 12) also show EMPIRE's mark
26		"EMPIRE" albeit on several of the
27		albums released by Fox, which, as
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		shown, are sold in close proximity to
4		EMPIRE's music because they share the
5		same search terms and genres.
6		3 3
7		Fox's Evidence:
8		Defendant's Counterclaims, attached
9		to Lens Decl. as Ex. 4 at pp. 55-58 ¶
10		23
11		
12		Defendant's Evidence:
13		Defendant's Counterclaims, Lens
14		Decl., Ex. 4 at pp. 55-58 ¶ 23
15		
16		FOX'S OBJECTIONS
17		Relevance. Fed. R. Evid. 401.
18		
19		FOX'S REPLY
20		Defendant's response is immaterial.
21		Defendant's evidence does not dispute
22		the fact that the screenshots of <i>albums</i> in
23		Paragraph 23 of defendant's
24		Counterclaims do not show defendant's
25		marks and that defendant highlighted the
26		albums. The first screenshot in
27		paragraph 23 shows the text of a Google
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		search result, not an album. The
4		screenshots of albums released by Fox
5		do not show defendant's marks.
6	25 TH D . 1.07 C	
7	35. The poster in Paragraph 27 of	<u>Defendant's Response</u> :
8	defendant's Counterclaims lists "Yazz of	Disputed.
9	Fox's Hit TV Show 'Empire.'"	EMPIRE disputes this statement in that
10		Fox's assertion misstates and
11		mischaracterizes the content of the
12		poster in paragraph 27 of EMPIRE's
13		Counterclaims. The poster lists Dizzy
14		Wright, Hospin, Jarren Benton, Joey
15		Bada\$\$, Dej Loaf, Rayven Justie, Jay
16		305, Chedda Da Connect and Yazz "of
17		Fox's Hit Show 'Empire'". This
18		mistakenly suggests that all of these rap
19		artists are affiliated with the <i>Empire</i>
20		television series; however, Dizzy
21		Wright, Hospin, Jarren Benton, Rayven
22		Justice and Pia Mia are EMPIRE rap
23		artists <u>not</u> affiliated with the <i>Empire</i>
24		television series.
25		Fox's Evidence:
26		Defendant's Counterclaims, attached
27		to Lens Decl. as Ex. 4 at pp. 59-60 ¶

1		
2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		27
4		
5		<b>Defendant's Evidence:</b>
6		EMPIRE's Counterclaims, Lens
7		Decl., Ex. 4 at pp. 59-60 ¶ 27
8		
9		FOX'S REPLY
10		Defendant's response is immaterial.
11		Defendant does not dispute the fact that
12		the poster in paragraph 27 lists "Yazz of
13		Fox's Hit TV Show 'Empire.'" Further,
14		defendant misstates the content of the
15		poster. The poster does <i>not</i> list the
16		artists separated by commas such that it
17		would suggest all the artists are affiliated
18		with <i>Empire</i> . Instead, the artists are
19		separated by either line breaks or the
20		following symbol:   (e.g., "Dizzy
21		Wright   Hopsin   Jarren Benton"). This
22		formatting makes clear that only Yazz is
23		from <i>Empire</i> .
24	26 The Instagram assessed	Defendant's Degraves
25	36. The Instagram comment	Defendant's Response:
26	"#teamCookie" in Paragraph 29 of	Disputed.
27	defendant's Counterclaims contains no	EMPIRE disputes this statement in that

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	other text.	the Instagram comment in paragraph 29
4		of EMPIRE's Counterclaims contains
5		other highly relevant text that evidences
6		the confusion between EMPIRE and the
7		Empire television series. Shaggy, a
8		Grammy award winner and one of the
9		best selling reggae musicians of all time,
10		posted EMPIRE's logo on the internet
11		and commented #therealempire #empire
12		(referring to EMPIRE the record label).
13		In response to Shaggy's comment,
14		another user posted the comments
15		#loveit and #teamCookie (referring to
16		the lead character in the <i>Empire</i>
17		television series).
18		
19		Fox's Evidence:
20		Defendant's Counterclaims, attached
21		to Lens Decl. as Ex. 4 at pp. 60-61 ¶
22		29
23		
24		<b>Defendant's Evidence:</b>
25		EMPIRE's Counterclaims, Lens
26		Decl., Ex. 4 at pp. 60-61 ¶ 29
27		
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		FOX'S REPLY
4		Defendant's response is immaterial.
5		Defendant's evidence does not dispute
6		the fact that the Instagram comment
7		"#teamCookie" in Paragraph 29 of
8		defendant's Counterclaims contains no
9		other text. The screenshot of the
10		Instagram comment in paragraph 29
11		speaks for itself—user sashareble's
12		comment of "#teamCookie" contains no
13		other text.
14		
15	37. The Facebook comment in	<b>Defendant's Response:</b>
16	Paragraph 30 of defendant's	Undisputed but incomplete.
17	Counterclaims by GSlaps, states, in part,	EMPIRE does not dispute that the rap
18	that "@nima_empire agreed to have	and hip hop music company Glaps
19	Empire (NOT the TV show) digitally	Entertainment, posted a comment on its
20	distribute the music of @JohnnyPhrank	Facebook site praising EMPIRE for the
21	and @Alocodaman; two artists who I	fame, success and longevity of the
22	manage."	"Empire logo" over the years (clarifying
23		that it was referring to EMPIRE not the
24		Empire television show), which is set
25		forth in full in paragraph 30 of
26		EMPIRE's Counterclaims (Lens Decl.,
27		Ex. 4 at pp. 61-62 ¶ 30). However,

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		Fox's assertion includes only a select
4		portion of that comment taken out of
5		context.
6		
7		Fox's Evidence
8		Defendant's Counterclaims, attached
9		to Lens Decl. as Ex. 4 at pp. 61-62
10		
11		FOX'S REPLY
12		Defendant does not dispute this
13		uncontroverted fact.
14	38. When asked to state the basis for	<b>Defendant's Response</b> :
15	its allegation of confusion in Paragraph	Objection/Disputed in part.
16	20 of the Counterclaims, defendant	EMPIRE objects to this statement on the
17	listed the examples found in its response	following grounds:
18	to Interrogatory No. 8.	(1) This is not a statement of material
19		fact as required by Local Rule 56-1 and
20		this Court's Scheduling Order dated July
21		23, 2015 (Dkt. 23, p.3 ¶5).
22		(2) Argumentative.
23		Subject to these objections, EMPIRE
24		does not dispute that it listed certain
25		"examples" of confusion in its response
26		to Fox's First Set of Interrogatories,
27		Interrogatory No. 8. EMPIRE disputes
28		FOX'S REPLY STATEMENT OF

1		
1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		that these are the only examples, as
4		expressly stated in EMPIRE's response,
5		including the additional examples of
6		confusion set forth in EMPIRE's
7		additional material facts below.
8		(3) Irrelevant.
9		
10		Fox's Evidence:
11		<ul> <li>Defendant's Responses To Fox's</li> </ul>
12		First Set of Interrogatories, attached
13		to Lens Decl. as Ex. 5 at pp. 75-77
14		(Interrogatory No. 8)
15		(and regularly 1 (et e)
16		Defendant's Evidence:
17		EMPIRE's Responses To Fox's First
18		Set of Interrogatories, Lens Decl.,
19		Ex. 5 at pp. 75-77 (Interrogatory No.
20		8)
21		
22		FOX'S REPLY
23		Defendant does not dispute the fact that
24		it listed the examples in its response to
25		Interrogatory No. 8 as the basis for its
26		allegation of confusion in Paragraph 20
27		of the Counterclaims.
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		
4	39. Expert Deborah Jay concluded	<b>Defendant's Response</b> :
5	that the survey she conducted "strongly	Objection/Disputed.
6	supports the conclusion that potential	EMPIRE objects to this statement on the
7	viewers of the <i>Empire</i> television series	following grounds:
8	are not likely to mistakenly believe that	(1) The expression of an opinion, in and
9	Empire Distribution (or Empire	of itself, is not a statement of fact as
10	Recordings) is the source, the sponsor	required by Local Rule 56-1 and this
11	of, or affiliated with the <i>Empire</i>	Court's Scheduling Order dated July 23,
12	television series (i.e., there is not a	2015 (Dkt. 23, p.3 ¶5).
13	likelihood of confusion)."	(2) Hearsay.
14		(3) Lacks foundation.
15		Subject to these objections, EMPIRE
16		does not dispute that the expert hired by
17		Fox, Deborah Jay, submitted a report
18		expressing, in part, this opinion.
19		However, EMPIRE strongly disputes
20		both the opinion and the factual basis of
21		the opinion as set forth in the rebuttal
22		Expert Report of Dr. Joel H. Steckel and
23		rebuttal Expert Report of Kristin J. Lieb.
24		
25		Fox's Evidence:
26		Report of Deborah Jay, attached to
27		Lens Decl. as Ex. 8 at p. 96

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		
4		<b>Defendant's Evidence:</b>
5		• Bowler Decl., ¶ 8, Ex. 73 (Expert
6		Report of Dr. Kristen J. Lieb) at ¶3,
7		34-45, 48; Bowler Decl., ¶ 7, Ex. 72
8		(Expert Report of Dr. Joel H.
9		Steckel) at p. 9, ¶¶21, 22; McDaniels
10		Decl. ¶¶ 15-17; Douthit Decl. ¶¶ 14;
11		Julien Decl. ¶¶ 22-26; Shami Decl.,
12		¶¶ 84, 92, 93, 94, 100, 114; Simon
13		Decl. ¶¶ 2-3; Bowler Decl., ¶ 7-8,
14		Ex. 72-73
15		
16		FOX'S OBJECTIONS
17		Relevance. Fed. R. Evid. 401. Lack of
18		personal knowledge. Fed. R. Evid. 602.
19		Impermissible opinion testimony. Fed.
20		R. Evid. 701. Impermissible legal
21		conclusion. Fed. R. Evid. 701.
22		Improper bases for expert opinion. Fed.
23		R. Evid. 703. Speculation.
24		
25		FOX'S REPLY
26		Defendant's response is immaterial.
27		Defendant does not dispute the fact that
28		FOX'S REPLY STATEMENT OF

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		expert Deborah Jay reached the stated
4		conclusion. Further, paragraph 100 of
5		the Shami declaration misstates evidence
6		in exhibit 7. Mr. Shami speculates that
7		"[i]t is not clear to consumers viewing
8		these pages that EMPIRE and Fox's
9		Empire are distinct entities." However,
10		many of the tweet authors appear to
11		distinguish between defendant and
12		<i>Empire</i> . For example, the tweet of
13		"Risto Smith" on the fifth page of
14		Exhibit 7 (Fox cannot point the Court to
15		a page number of the exhibit since
16		defendant failed to consecutively
17		paginate exhibits in accordance with
18		L.R. 11-5.2) appears to be trying to sell
19		the "empire.hiphop" internet domain
20		name to different "empire" entities the
21		user knows are distinct, including
22		defendant, Empire, Empire Magazine,
23		and Beats Empire.
24	7.0	
25	Dilu	tion
26	40. Defendant has not identified any	<u>Defendant's Response</u> :
27	evidence in its Counterclaims to support	Objection/Disputed:
20		

1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	its conclusory assertions that its marks	EMPIRE objects to this statement on the
4	are widely recognized by the general	following grounds:
5	consuming public.	(1) This is not a statement of material
6		fact as required by Local Rule 56-1 and
7		this Court's Scheduling Order dated July
8		23, 2015 (Dkt. 23, p.3 ¶5).
9		(2) Irrelevant.
10		(3) Argumentative.
11		(4) Lacks foundation.
12		Subject to these objections, EMPIRE
13		disputes this assertion as there is
14		substantial evidence in EMPIRE's
15		Counterclaims that EMPIRE's marks are
16		widely recognized by the general
17		consuming public.
18		
19		Fox's Evidence:
20		Defendant's Counterclaims, attached
21		to Lens Decl. as Ex. 4 at pp. 47-71
22		
23		<b>Defendant's Evidence:</b>
24		EMPIRE's Counterclaims, Lens
25		Decl., Ex. 4 at ¶¶ 9-19, 25-30.
26		
27		FOX'S REPLY
28		FOX'S REPLY STATEMENT OF

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3	111010	D-f14'
4		Defendant's response is immaterial.
5		Defendant's evidence does not dispute
6		the fact that defendant has not identified
7		any evidence in its Counterclaims to
8		support its conclusory assertions that its
9		marks are widely recognized by the
10		general consuming public.
11	41. Empire Distribution was formed	Undisputed but incomplete.
12	in June 2011.	Fox cites to an allegation in its
13		Complaint (Lens Decl., Ex. 2 at p. 11 ¶
14		19) and EMPIRE's Answer to the
15		Complaint (Lens Decl., Ex. 3 at p. 37 ¶
16		19) as evidence to support this statement
17		but includes only a select excerpt from
18		the allegation and fails to include the
19		remainder of the allegation including the
20		relevant portion stating that EMPIRE
21		began using "Empire Distribution'
22		and 'Empire Recordings' in
23		commerce [on] January 1, 2010."
24		
25		Fox's Evidence:
26		• Compare Fox's Complaint, attached
27		to Lens Decl. as Ex. 2 at p. 11 ¶ 19

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1 2	FOX'S UNCONTROVERTED FACTS	SUPPORTING EVIDENCE
3		with Defendant's Answer to
4		Complaint, attached to Lens Decl. as
5		Ex. 3 at p. 37 ¶ 19
6		
7		FOX'S REPLY
8		Defendant does not dispute the fact that
9		Empire Distribution was formed in June
10		2011.
11		
12		
13		
14		

## DEFENDANT'S ADDITIONAL MATERIAL FACTS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

3		
4	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
5	MATERIAL FACTS	
6	42. Continuously since at least as	FOX'S RESPONSE:
7	early as January 2010, EMPIRE has	Disputed. Lack of personal knowledge.
8	used the mark "EMPIRE" alone and	FRE 602.
9	with other words as marks to signify	
10	services and products originating	<b>Defendant's Evidence:</b>
11	uniquely from EMPIRE.	Hobbs Decl., ¶ 4.
12		
13	43. EMPIRE's common law	FOX'S RESPONSE:
14	trademark rights in the "EMPIRE" mark	Disputed. Lack of personal knowledge.
15	and variants date back to January, 2010.	FRE 602. Impermissible legal
16		conclusion. FRE 701.
17		
18		<b>Defendant's Evidence:</b>
19		Hobbs Decl., ¶ 5.
20		
21	44. On January 24, 2014, EMPIRE	Undisputed.
22	filed applications through counsel with	
23	the USPTO for its "EMPIRE" marks and	
24	received Serial Nos. 86174484 and	
25	86174393 for such applications. ("First	
26	Empire Applications").	
27	45. On December 10, 2014, EMPIRE	Undisputed.

1

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	filed applications through counsel for	
4	the mark "EMPIRE Distribution" and	
5	received Serial Nos. 86476822 and	
6	86477123 for such applications.	
7	("Second Empire Applications").	
8	46. On April 8, 2015, EMPIRE filed	Undisputed.
9	applications through counsel for the	
10	mark "EMPIRE" and received Serial	
11	Nos. 86590365, 86590402, 86590415	
12	and 86590385 for such applications.	
13	("Third Empire Applications").	
14	47. The EMPIRE Applications	Undisputed.
15	include applications in International	
16	Trademark Classes 9 and 41.	
17	48. Finding no conflicting prior	FOX'S RESPONSE:
18	applications or existing registrations and	Undisputed that five of defendant's
19	that the marks were entitled to	applications have been approved for
20	registration, the USPTO has approved	publication (following which there will
21	five of the EMPIRE Applications, which	be an objection period). Disputed as to
22	will be publishing on January 19, 2016.	USPTO's reasons for approving the
23		applications for publication based on
24		lack of personal knowledge. FRE 602.
25		For example, as to application
26		86174484, the USPTO cited a
27		registered mark as presenting a bar to
28		FOX'S REPLY STATEMENT OF

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	SOIT ORTING EVIDENCE
3		registration of the mark and only
4		reconsidered that decision after Empire
5		Distribution entered into a consent
6		agreement with the owner of the
7		registered mark. Relevance. FRE 401.
8		
9		<u>Defendant's Evidence</u> :
10		Hobbs Decl. ¶¶ 9-10, Ex. 1.
11		
12		Fox's Evidence:
13		Reynolds Decl. ¶ 11, Ex. 30.
14	49. EMPIRE's application for Serial	FOX'S RESPONSE:
15	No. 86174393 for "EMPIRE" was filed	Disputed. The cited evidence does not
16	January 24, 2014, nearly a year before	demonstrate this fact. Empire
17	Fox broadcast the first episode of the	Distribution filed an application to
18	television program "EMPIRE" on	register the trademark "Empire
19	January 7, 2015.	Recordings," Application Serial No.
20		86174393 on January 24, 2014.
21		Defendant subsequently requested that
22		the mark be amended from "Empire
23		Recordings" to "Empire" on December
24		7, 2015, nearly a year after Fox
25 26		broadcast the first episode of <i>Empire</i> .
27		
28		<b>Defendant's Evidence:</b>
۵۵		FOX'S REPLY STATEMENT OF

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Hobbs Decl. ¶ 12, Ex. 1.
4		
5		Fox's Evidence:
6		Reynolds Decl. ¶ 12, Ex. 32.
7	50. The EMPIRE applications were	FOX'S RESPONSE:
8	filed without claim to any particular font	Disputed. The cited evidence does not
9	style, size, design or color and protect	demonstrate this purported fact.
10	and permit use of the Empire marks	Impermissible legal conclusion. FRE
11	regardless of the font style, design, size	701. Relevance. FRE 401.
12	or color.	
13		<b>Defendant's Evidence:</b>
14		Hobbs Decl. ¶ 13.
15		Foy's Fyidonos
16		Fox's Evidence:
17		Shami Decl. ¶ 36.
18	51. Of the over "650 registered or	EOVIC DECDONICE.
19		FOX'S RESPONSE:
20	pending applications for 'empire' related	Disputed. Relevance. FRE 401.
21	marks" (SUF ¶ 11), many of the	Further disputed to the extent defendant
22	applications are for services unrelated to	suggests that the services and products
23	the services and products provided by	provided by Fox under the "Empire"
24	Fox and EMPIRE under their marks.	mark are the same as those provided by
25		defendant under its purported marks.
26		
27		<b>Defendant's Evidence:</b>
28		Hobbs Decl. ¶ 14.
20		FOX'S REPLY STATEMENT OF

DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
52. Of the over "650 registered or	FOX'S RESPONSE:
pending applications for 'empire' related	Disputed. The cited evidence does not
marks" (SUF ¶ 11), the supporting	demonstrate this purported fact. Over
marks for many of such applications or	650 registered or pending applications
registrations are no longer in use, the	for "empire" related marks appear in
marks have been abandoned and they are	the USPTO database when searching
therefore not entitled to trademark rights	for "live" (i.e. not abandoned) marks.
or protection.	Relevance. FRE 401. Impermissible
	legal conclusion. FRE 701.
	<b>Defendant's Evidence:</b>
	Hobbs Decl. ¶ 15.
	Fox's Evidence:
	Reynolds Decl. ¶ 2.
	FOX'S RESPONSE:
applications in the USPTO for the mark	Disputed. Relevance. FRE 401.
"Empire," in International Trademark	
Classes 9 and 41, asserting trademark	<b>Defendant's Evidence:</b>
rights therein and seeking the benefits of	Hobbs Decl. ¶ 16, Ex. 2.
U.S. federal trademark registrations.	
54. Fox has shown a pattern of filing	FOX'S RESPONSE:
trademark applications in the USPTO	Disputed. Impermissible legal
for the names of television programs that	conclusion. FRE 701. Relevance.
it broadcasts, asserting trademark rights	FRE 401.
	52. Of the over "650 registered or pending applications for 'empire' related marks" (SUF ¶ 11), the supporting marks for many of such applications or registrations are no longer in use, the marks have been abandoned and they are therefore not entitled to trademark rights or protection.  53. Fox has filed two trademark applications in the USPTO for the mark "Empire," in International Trademark Classes 9 and 41, asserting trademark rights therein and seeking the benefits of U.S. federal trademark registrations.  54. Fox has shown a pattern of filing trademark applications in the USPTO for the names of television programs that

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	therein and seeking the benefits of U.S.	
4	federal trademark registrations.	<b>Defendant's Evidence:</b>
5		Hobbs Decl. ¶ 17, Ex. 3.
6		
7		FOWIG PERPONSE
8	55. Fox has shown a pattern of filing	<b>FOX'S RESPONSE</b> :
9	trademark opposition and cancellation	Disputed. Impermissible legal
10	actions before the Trademark Trial and	conclusion. FRE 701. Relevance.
11	Appeal Board ("TTAB") of the USPTO	FRE 401.
12	arising out of the names of programs	
13	that it broadcasts, asserting trademark	<b>Defendant's Evidence:</b>
14	rights therein and seeking the benefits of	Hobbs Decl. ¶ 18, Ex. 4.
15	U.S. trademark rights in the names of its	
16	television programs.	
17	56. Since January 2010, EMPIRE has	FOX'S RESPONSE:
18	established itself as a leading record	Disputed. Impermissible opinion
19	label and music distribution company	testimony. FRE 701.
20	for urban music, including hip-hop, rap,	
21	and R&B in the United States, releasing	<b>Defendant's Evidence:</b>
22	over 11,000 albums/singles, 6,000 music	Shami Decl., ¶¶ 6-21
23	videos and 85,000 songs.	Eorla Eridonas
24		Fox's Evidence:
25		Lens Decl., Ex. 7, p. 88-89.
26	57. EMPIRE has worked with an	<b>FOX'S RESPONSE</b> :
	extensive list of well-known hip hop,	Disputed. Impermissible opinion
27	rap, and R&B musical artists in the	testimony. FRE 701.
28		FOX'S REPLY STATEMENT OF

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	world, including but not limited to, T.I.,	
4	Snoop Dogg, Kendrick Lamar, Trinidad	Defendant's Evidence:
5	James, Too \$hort, The Game, Mally	Shami Decl., ¶¶ 7, 9-19
6	Mall, Rich Homie Quan, Tyga, Shaggy,	
7	Migos, Busta Rhymes, Fat Joe, Sage the	Fox's Evidence:
8	Gemini, Cam'ron, Jim Jones, Rocko,	Lens Decl., Ex. 7, p. 88-89.
9	Gladys Knight, Rae Sremmurd, and	
10	many more.	
11	58. EMPIRE helped launch the	FOX'S RESPONSE:
12	careers of a number of rap and hip hop	Disputed. Impermissible opinion
13	hit-makers including, for example,	testimony. FRE 701.
14	Grammy Award winning, multi-	
15	platinum recording artist, Kendrick	<u>Defendant's Evidence</u> :
16	Lamar.	Shami Decl., ¶ 8
17		
18 19	59. EMPIRE released eleven of the	FOX'S RESPONSE:
20	top one hundred hip-hop songs of 2015	Disputed. Hearsay. FRE 801, 802.
21	listed by Spotify (a commercial music	
22	streaming service with over 75 million	<b>Defendant's Evidence:</b>
23	active users) including the number one	Shami Decl., ¶ 20
24	song, "Flex" by Rich Homie Quan.	
25	60. EMPIRE has four albums on	FOX'S RESPONSE:
26	Rolling Stone's list of the 40 Best Rap	Disputed. Hearsay. FRE 801, 802.
27	Albums of 2015, four tracks in	Disputed. Hearsay. 1 KL 601, 602.
28	Thoums of 2013, four trucks in	FOX'S REPLY STATEMENT OF

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3	Pitchfork's Best Songs of 2015, and	<b>Defendant's Evidence</b> :
4	three artists in Pigeons & Planes' New	Shami Decl., ¶ 20
5	Artists for 2016 list.	
6	61. What began as EMPIRE	FOX'S RESPONSE:
7		
8	Distribution in 2010 has grown into a	Disputed to the extent defendant claims
9	full-service music company under the	that the name of its company is
10	umbrella brand name "EMPIRE," which	"Empire" rather than "Empire
11	includes "EMPIRE Distribution"	Distribution." The party to this
12	(distribution services), "EMPIRE	litigation and company at issue is
13	Recordings" (recording and label), and	Empire Distribution, Inc. See Lens
14	"EMPIRE Publishing" (publishing	Decl. Ex. 4 (defendant's
15	services).	Counterclaims).
16		
17		<b>Defendant's Evidence:</b>
18		Shami Decl., ¶¶ 22-29
19		
20	62. EMPIRE has been using	FOX'S RESPONSE:
21	"EMPIRE" as a standalone trademark in	Disputed to the extent defendant
22	association with its music business	suggests it has primarily identified its
23		music business with the standalone
24	continuously since at least as early as	
25	January 2010.	"Empire" mark since January 2010.
26		Defendant's own Counterclaims
27		indicate otherwise.
28		FOX'S REPLY STATEMENT OF

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3		<u>Defendant's Evidence</u> :
4		Shami Decl., ¶ 31
5		Eowla Ewidonos
6		Fox's Evidence:
7		Defendant's Counterclaims, attached to
8		Lens Decl. as Ex. 4 at ¶¶ 16-18, 21-22.
9	63. EMPIRE has used the primary	FOX'S RESPONSE:
10	branding "EMPIRE" sometimes in	Disputed to the extent defendant
11	association with other words such as	suggests it has primarily identified its
12	"Distribution" and "Recordings," to	music business with the standalone
13	identify the services that EMPIRE	"Empire" mark. Defendant's own
14	provides and the products associated	Counterclaims indicate otherwise.
15	with those services under the umbrella	
16	EMPIRE brand.	<b>Defendant's Evidence:</b>
17		Shami Decl., ¶ 31
18		Fox's Evidence:
19		Defendant's Counterclaims, attached to
20		Lens Decl. as Ex. 4 at ¶¶ 16-18, 21-22.
21	64. Prior to the first airing of Fox's	FOX'S RESPONSE:
22	"Empire" television series, EMPIRE had	Disputed. Defendant's own evidence
23	•	•
24	six pending trademark applications.	directly contradicts this purported fact.
25		<u>Defendant's Evidence</u> :
26		Shami Decl., ¶ 34
27		Fox's Evidence:

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	WATERIAL FACTS	Halda Daal III ( 0
4		Hobbs Decl., ¶¶ 6-8.
5 6	65. By April of 2015, EMPIRE had an additional four pending trademark	Undisputed.
7	applications.	
8	66. Five of these ten trademark	FOX'S RESPONSE:
10	applications – three for EMPIRE and	Undisputed that five of defendant's
11	two for EMPIRE DISTRIBUTION – are	applications have been approved for
12	expected to be published by the United States Patent and Trademark Office in	publication (following which there will be an objection period) but disputed
13	January 2016.	that defendant has five additional
14	January 2010.	trademark applications. Defendant's
15		own evidence directly contradicts this
16		purported fact.
17		
18		Defendant's Evidence:
19		Shami Decl., ¶ 34
20		
21		Fox's Evidence:
22		Hobbs Decl., ¶¶ 6-8.
23	67. EMPIRE's brand is represented in	EOV'S DESDONSE.
24	67. EMPIRE's brand is represented in the marketplace in several ways,	FOX'S RESPONSE:  Disputed to the extent defendant
25	including, but not limited to, the logos	suggests it has primarily represented its
26 27	depicted in paragraph 35 of the	brand in the marketplace with the logos
41	1 1 100 1	

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	declaration of Ghazi Shami.	depicted in paragraph 35 of the
4		declaration of Ghazi Shami.
5		Defendant's own Counterclaims
6		indicate otherwise.
7		
8		<b>Defendant's Evidence:</b>
9		Shami Decl., ¶¶ 35, 36
10		
11		Fox's Evidence:
12		Defendant's Counterclaims, attached to
13		Lens Decl. as Ex. 4 at ¶¶ 16-18, 21-22.
14		
15	68. Advertising and publicity	FOX'S RESPONSE:
16	campaigns began immediately on	Disputed to the extent defendant does
17	EMDIDE's loungh in 2010 and increased	
1/	EMPIRE's launch in 2010 and increased	not specify what its "[a]dvertising and
18	markedly beginning in late 2013 and	not specify what its "[a]dvertising and publicity campaigns" were and whether
18	markedly beginning in late 2013 and	publicity campaigns" were and whether
18 19	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and
18 19 20	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and publicized Empire Distribution's
18 19 20 21	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and publicized Empire Distribution's <i>marks</i> , as opposed to Empire
18 19 20 21 22	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and publicized Empire Distribution's <i>marks</i> , as opposed to Empire Distribution's <i>artists</i> . Relevance
18 19 20 21 22 23	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and publicized Empire Distribution's <i>marks</i> , as opposed to Empire Distribution's <i>artists</i> . Relevance objection to the extent these campaigns
18 19 20 21 22 23 24	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and publicized Empire Distribution's marks, as opposed to Empire Distribution's artists. Relevance objection to the extent these campaigns advertised and publicized Empire
18 19 20 21 22 23 24 25	markedly beginning in late 2013 and	publicity campaigns" were and whether such campaigns advertised and publicized Empire Distribution's <i>marks</i> , as opposed to Empire Distribution's <i>artists</i> . Relevance objection to the extent these campaigns advertised and publicized Empire Distribution's <i>artists</i> without reference

_		
1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		
4		Defendant's Evidence:
5		Shami Decl., ¶ 37
6		Sham Been,    37
7		
8	69. EMPIRE spent approximately	FOX'S RESPONSE:
9	\$650,000 in 2014 in marketing,	Disputed to the extent these figures do
10	advertising, and promotion and	not distinguish between amounts spent
11	approximately \$2.5 million in 2015 on	marketing, advertising, and promoting
12	advertising, marketing, and promotional	Empire Distribution's marks, as
13	expenses.	opposed to Empire Distribution's
14		artists. Relevance objection as to the
15		portion of these amounts spent
16		marketing, advertising, and promoting
17		Empire Distribution's artists. FRE
18		401.
19		
20		<u>Defendant's Evidence</u> :
21		Shami Decl., ¶ 37
22		
23	70. The EMPIRE logo is used in a	FOY'S DESDONSE.
24	variety of advertising and promotional	FOX'S RESPONSE:  Disputed to the extent defendant claims
25	contexts including, for example, iTunes	the Empire Distribution logo is used in
26	CD covers, billboards, concerts, and	
27		advertising and promotional contexts
• •	promotional items.	beyond the limited examples provided

FOX'S REPLY STATEMENT OF UNCONTROVERTED FACTS & CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3		in paragraphs 38-40 of Mr. Shami's
4		declaration.
5		
6		<u>Defendant's Evidence</u> :
7		Shami Decl., ¶¶ 38-40
8		
9	71. EMPIRE is a well known, highly	FOX'S RESPONSE:
10	respected and influential record label	Disputed. Impermissible opinion
12	and music distribution company.	testimony. FRE 701.
13		
14		<b>Defendant's Evidence</b> :
15		Shami Decl., ¶¶ 35-61; McDaniels
16		Decl. ¶¶ 4-8; Douthit Decl. ¶¶ 11-14;
17		Julien Decl. ¶¶ 7-11
18		Fox's Evidence:
19		Lens Decl., Ex. 7, p. 88-89.
20	72. EMPIRE has sold millions of	Undisputed.
21	songs distributed or recorded under the	
22	EMPIRE marks.	
23	73. Record labels, including	FOX'S RESPONSE:
24	EMPIRE, are important to consumers in	Disputed. Impermissible opinion
25	the urban music genre.	testimony. FRE 701. Improper bases
26		for expert opinion. FRE 703.
27		
28		FOX'S REPLY STATEMENT OF

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Defendant's Evidence:
4		Bowler Decl., ¶ 8, Ex. 73 (Expert
5		Report of Dr. Kristen J. Lieb) at ¶3, 12-
6		22, 46; McDaniels Decl. ¶¶ 9-14;
7		Douthit Decl. ¶¶ 7-10; Julien Decl. ¶¶
8		12-21; Shami Decl., ¶¶ 62-83
9		
10		Fox's Evidence:
11		Lens Decl., Ex. 7, p. 86-88.
12	74. EMPIRE's reputation is being	FOX'S RESPONSE:
13	seriously damaged by Fox's	Disputed. Impermissible legal
14	unauthorized use of the "Empire" name	conclusion. FRE 701.
15	for the Empire Series and Empire Series	
16	Music.	<u>Defendant's Evidence</u> :
17		Shami Decl., ¶¶ 90, 93
18	75. EMPIRE and Fox are competing	FOX'S RESPONSE:
19	for the sale of the same type of music to	Disputed. Impermissible legal
20	the same customers in the same places.	conclusion. FRE 701.
21		
22		<u>Defendant's Evidence</u> :
23		Shami Decl., ¶¶ 95-113
24		Foy's Fyidonos
25		Fox's Evidence:  Shami Docl. ¶ 02 (distinguishing)
26		Shami Decl. ¶ 92 (distinguishing
27		between the audience for the <i>Empire</i>
28		Soundtracks from the audience for FOX'S REPLY STATEMENT OF

1	DEFEND AND CARDIONAL	CURRODAING EMPENCE
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Empire Distribution's music).
4		
5	76. Fox's Empire marks are nearly	FOX'S RESPONSE:
6	identical to EMPIRE's marks.	Disputed. Impermissible legal
7		conclusion. FRE 701. Defendant's
8		cited evidence does not support this
9		purported fact. The appearances of the
10		marks speak for themselves.
11		
12		<u>Defendant's Evidence</u> :
13		Shami Decl., ¶¶ 35, 96; Ryan Decl., ¶ 6
14		Fox's Evidence:
15		Ryan Decl. ¶ 6; Lens Decl., Ex. 4 at pp.
16		52-55 ¶¶ 16-18; 21-22.
17 18	77. Given their overlapping	FOX'S RESPONSE:
19	businesses, there is likely to be	Disputed. Impermissible opinion
20	consumer confusing between EMPIRE,	testimony. FRE 701. Further,
21	on the one hand, and Fox's <i>Empire</i>	defendant's cited evidence does not
22	television series and music, on the other	support this purported fact, as it does
23	hand.	not involve instances of mistaken
24		purchasing decisions and thus provides
25		no evidence of actionable confusion.
26		
27		Defendant's Evidence:

DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
MATERIAL FACTS	
	Shami Decl., ¶¶ 84, 92, 93, 94, 100,
	114; McDaniels Decl. ¶¶ 15-17;
	Douthit Decl. ¶¶ 14; Julien Decl. ¶¶ 22-
	26; Simon Decl. ¶¶ 2-3
	B 4 B 41
	Fox's Evidence:
	Lens Decl., Ex. 8, p. 96.
78. There have been many instances	FOX'S RESPONSE:
of actual confusion expressed by artists	Disputed. Relevance. FRE 401. Lack
and consumers between EMPIRE, on the	of personal knowledge. FRE 602.
one hand, and Fox's <i>Empire</i> television	Impermissible opinion testimony. FRE
series and music, on the other hand.	701. Impermissible legal conclusion.
	FRE 701. Hearsay. FRE 801, 802.
	Speculation. Further, defendant's cited
	evidence does not support this
	purported fact, as it does not involve
	instances of mistaken purchasing
	decisions and thus provides no
	evidence of actionable confusion.
	<b>Defendant's Evidence:</b>
	Shami Decl., ¶¶ 115-135, Exs. 8-24;
	Simon Decl. ¶¶ 2-3; McDaniels Decl.
	¶¶ 15-17; Douthit Decl. ¶¶ 14; Julien
	Decl. ¶¶ 22-26
	78. There have been many instances of actual confusion expressed by artists and consumers between EMPIRE, on the one hand, and Fox's <i>Empire</i> television

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		P 1 P 11
4		Fox's Evidence:
5		Lens Decl., Ex. 8, p. 96.
6	79. There are consumers and artists	FOX'S RESPONSE:
7	who have expressed confusion as to	Disputed. Relevance. FRE 401. Lack
8	whether the products bearing EMPIRE's	of personal knowledge. FRE 602.
9	marks were sponsored or approved by	Impermissible opinion testimony. FRE
10	Fox or the <i>Empire</i> television series.	701. Impermissible legal conclusion.
11		FRE 701. Hearsay. FRE 801, 802.
12		Speculation. Further, defendant's cited
13		evidence does not support this
14		purported fact, as it does not involve
15		instances of mistaken purchasing
16		decisions and thus provides no
17		evidence of actionable confusion.
18		
19		<u>Defendant's Evidence</u> :
20		McDaniels Decl. ¶¶ 15-17; Douthit
21		Decl. ¶¶ 14; Julien Decl. ¶¶ 22-26;
22		Shami Decl., ¶¶ 84, 92, 93, 94, 100,
23		114115-135, Exs. 8-24; Simon Decl. ¶¶
24		2-3
25		Foy's Fyidones
26		Fox's Evidence:
27		Fox's Evidence: Lens Decl., Ex. 8, p.
28		96.

FOX'S REPLY STATEMENT OF UNCONTROVERTED FACTS & CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	80. There are consumers and artists	FOX'S RESPONSE:
4	who have expressed confusion as to	Disputed. Relevance. FRE 401. Lack
5	whether the <i>Empire</i> series and the	of personal knowledge. FRE 602.
6	Empire series related products were	Impermissible opinion testimony. FRE
7	sponsored or approved by EMPIRE.	701. Impermissible legal conclusion.
8		FRE 701. Hearsay. FRE 801, 802.
9		Speculation. Further, defendant's cited
10		evidence does not support this
11		purported fact, as it does not involve
12		instances of mistaken purchasing
13		decisions and thus provides no
14		evidence of actionable confusion.
15		
16		<b>Defendant's Evidence:</b>
17		McDaniels Decl. ¶¶ 15-17; Douthit
18		Decl. ¶¶ 14; Julien Decl. ¶¶ 22-26;
19		Shami Decl., ¶¶ 84, 92, 93, 94, 100,
20		114115-135, Exs. 8-24; Simon Decl. ¶¶
21		2-3
22		P 1 P 11
23		Fox's Evidence:
24		Lens Decl., Ex. 8, p. 96.
25	81. Numerous consumers, artists, and	FOX'S RESPONSE:
26	EMPIRE's business partners have	Disputed. Relevance. FRE 401. Lack
27	expressed confusion to EMPIRE as to	of personal knowledge. FRE 602.

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	whether the fictional "Empire" program	Impermissible opinion testimony. FRE
4		
5	has any affiliation or business	701. Impermissible legal conclusion.
6	relationship with the real-life EMPIRE.	FRE 701. Hearsay. FRE 801, 802.
7		Speculation. Further, defendant's cited
		evidence does not support this
8		purported fact, as it does not involve
9		instances of mistaken purchasing
10		decisions and thus provides no
11		evidence of actionable confusion.
12		
13		<b>Defendant's Evidence:</b>
14		McDaniels Decl. ¶¶ 15-17; Douthit
15		Decl. ¶¶ 14; Julien Decl. ¶¶ 22-26;
16		Shami Decl., ¶¶ 84, 92, 93, 94, 100,
17		114115-135, Exs. 8-24; Simon Decl. ¶¶
18		2-3
19		
20		Fox's Evidence:
21		Lens Decl., Ex. 8, p. 96.
22		
23	82. Fox has used the "Empire" name	FOX'S RESPONSE:
24	as a source-identifier outside of the	Disputed. Relevance. FRE 401.
25	construct of the Empire series.	Defendant's cited evidence does not
26		support this purported fact. Defendant
27		misstates the cited testimony in Bowler

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Decl. ¶ 4, Ex. 69, Ross Decl. ¶ 3, and
4		Bywater Decl. ¶ 3. These pieces of
5		evidence reference the music and
6		limited promotional products released
7		in connection with the Empire series.
8		They do not suggest that Fox is using
9		the "Empire" name "outside of the
10		construct of the <i>Empire</i> series."
11		
12		<b>Defendant's Evidence:</b>
13		Bywater Decl. ¶ 3; Ross Decl. ¶ 2;
14		Bowler Decl., ¶ 4, Ex. 69 at 22:3-5,
15		22:10-18, 22:25-23:1, 23:4-6; 23:8-9,
16		23:14-24:4; 24:8-25:7, 25:11-23,
17		32:23-33:10, 33:14-15, 33:21-34:5,
18		34:9-10, 34:13-14, 34:16-22, 37:22-23,
19		38:2-10, 38:25-39:5, 39:7-13, 39:18-22;
20		59:4-7, 66:24-67:5, 67:8-21, 70:2-17,
21		70:21, 85:3-10, 85:14-17, 130:15-17,
22		130:20-22, 131:4-6; 132:2-5, 132:14-
23		17, 132:20-24, 133:2-5, 133:9-13,
24		133:15-16, 133:20, 133:24-134:1,
25		134:9-10, 134:13-17, 134:20-137:11,
26		138:8-14, 138:17-24; 139:20-140:11;
27		140:20-141:2; 142:19-143:4; 143:15-
28		DOWN DEDLY OF FEDERAL COMMON

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		20; 144:8-17, 145:2-12, 158:5-8,
4		158:11-21, 163:1-3, 163:10-164:1,
5		164:5-7, 164:11-164:24, 165:15-16,
6		165:19-21, 167:3-4, 167:7, 208:3-6;
7		209:15-24, 210:4-5, 210:8-1; Bywater
8		Exs. 3, 4, 10, 11, 12, 13, 30.
9		
10		
11	83. Empire has been involved in	FOX'S RESPONSE:
12	network television programming and	Disputed. Relevance. FRE 401.
13	intends to continue using television-	Defendant's cited evidence does not
14	based media to promote and grow its	support this purported fact. Mr.
15	brand.	Shami's appearance on one episode of
16		a reality television show, participation
17		in the production of music videos that
18		have appeared on television, and vague
19		plans to have Empire Distribution's
20		artists appear on television in the future
21		do not support defendant's claim that
22		Empire Distribution has been involved
23		with network television programming.
24		
25		<u>Defendant's Evidence</u> :
26		Shami Decl. ¶¶ 136-141
27		
28		

4		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	84. Fox's purported survey expert,	FOX'S RESPONSE:
4	Philip Johnson, conducted a survey	Undisputed that Mr. Johnson conducted
5	purporting to measure the extent of	a survey to test for reverse confusion.
6	"reverse confusion" between the	However, Fox disputes to the
7	Empire's marks and the <i>Empire</i> series	characterization of Mr. Johnson as a
8	and <i>Empire</i> series music.	"purported" survey expert.
9		
10		<b>Defendant's Evidence:</b>
11		Bowler Decl., ¶ 6, Ex. 71 (Johnson
12		Deposition Transcript) at 20:2-10.
13		
14	0.5	
15	85. Fox's purported survey expert,	FOX'S RESPONSE:
15 16	Deborah Jay, conducted a survey	Undisputed that Dr. Jay conducted a
	Deborah Jay, conducted a survey purporting to measure the extent of	Undisputed that Dr. Jay conducted a survey to test for forward confusion.
16	Deborah Jay, conducted a survey	Undisputed that Dr. Jay conducted a
16 17	Deborah Jay, conducted a survey purporting to measure the extent of	Undisputed that Dr. Jay conducted a survey to test for forward confusion.
16 17 18	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the
16 17 18 19	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a
16 17 18 19 20	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a
16 17 18 19 20 21	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a "purported" survey expert.
16 17 18 19 20 21 22	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a "purported" survey expert.  Defendant's Evidence:
16 17 18 19 20 21 22 23	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series and <i>Empire</i> series music.	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a "purported" survey expert.  Defendant's Evidence:  Lens Decl., ¶ 11, Ex. 8.
16 17 18 19 20 21 22 23 24	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series and <i>Empire</i> series music.  86. The survey conducted by Philip	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a "purported" survey expert.  Defendant's Evidence: Lens Decl., ¶ 11, Ex. 8.
16 17 18 19 20 21 22 23 24 25	Deborah Jay, conducted a survey purporting to measure the extent of "forward confusion" between the Empire's marks and the <i>Empire</i> series and <i>Empire</i> series music.	Undisputed that Dr. Jay conducted a survey to test for forward confusion.  However, Fox disputes to the characterization of Dr. Jay as a "purported" survey expert.  Defendant's Evidence:  Lens Decl., ¶ 11, Ex. 8.

_ <sub>1</sub>		
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	of reverse confusion in this matter.	expert presents no survey data showing
4		that any of his alleged criticisms would
5		have changed Mr. Johnson's survey
6		results.
7		1000100
8		Defendant's Evidence:
9		Bowler Decl., ¶ 7, Ex. 72 (Expert
10		Report of Dr. Joel H. Steckel) at p.9,
11		¶21
12		"
13		Fox's Evidence:
14		Lens Decl., Ex. 9
15	87. Philip Johnson's choice of stimuli	FOX'S RESPONSE:
16	inhibited respondents from linking the	Disputed. The opinion cited by
17	stimuli with Empire.	defendant is also immaterial, as its
18		expert presents no survey data showing
19		that his alleged criticism would have
20		changed Mr. Johnson's survey results.
21		
22		<u>Defendant's Evidence</u> :
23		Bowler Decl., ¶ 7, Ex. 72 (Expert
24		Report of Dr. Joel H. Steckel) at p.9,
25		¶21
26		Fox's Evidence:
27		Lens Decl., Ex. 9
28		FOX'S REPLY STATEMENT OF

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	SUIT ORTHOG EVIDENCE
3		Lens Reply Decl., Ex. 26 (P. Johnson
4		Depo.) at 43:1-44:10, 61:6.
5	88. Philip Johnson's survey question	FOX'S RESPONSE:
6	wording minimized the possibility of	Disputed. The opinion cited by
7	respondents linking the stimuli with	defendant is also immaterial, as its
8	Empire.	expert presents no survey data showing
9		that his alleged criticism would have
10		changed Mr. Johnson's survey results.
11		
12		<b>Defendant's Evidence:</b>
13		Bowler Decl., ¶ 7, Ex. 72 (Expert
14		Report of Dr. Joel H. Steckel) at p.9,
15		¶21
16		
17		Fox's Evidence:
18		Lens Decl., Ex. 9
19		Lens Reply Decl., Ex. 26 (P. Johnson
20		Depo.) at 61:9-63:3.
21	89. Philip Johnson's survey did not	FOX'S RESPONSE:
22	measure confusion among consumers	Disputed. Defendant's cited evidence
23	who have encountered both parties'	does not support this purported fact.
24	marks.	This purported fact is also immaterial
25		and inaccurate, because in a reverse
26		confusion survey, the appropriate
27		universe is the senior user's (i.e.,

_		
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		
4		defendant's) customers.
5		<u>Defendant's Evidence</u> :
6		Bowler Decl., ¶ 6, Ex. 71 at 21:11-14,
7		21:16-21, 21:23-22:3, 22:5-18.
8		
9		Fox's Evidence:
10		McCarthy on Trademarks and Unfair
11		Competition § 32:159
12		Lens Decl., Ex. 9
13	90. Deborah Jay's survey results do	FOX'S RESPONSE:
14	not generalize beyond the situation	Disputed. The opinion cited by
15	where a consumer is watching a	defendant is also immaterial, as its
16	television trailer or commercial.	expert presents no survey data showing
17		that his alleged criticism would have
18		changed Dr. Jay's survey results.
19		
20		<u>Defendant's Evidence</u> :
21		Bowler Decl., ¶ 7, Ex. 72 (Expert
22		Report of Dr. Joel H. Steckel) at p.9,
23		¶22
24		
25		Fox's Evidence:
26		Lens Decl., Ex. 8
27		Lens Reply Decl., Ex. 27 (D. Jay
		Depo.) at 18:1-18, 19:13-24, 20:20-
28		FOX'S REPLY STATEMENT OF

1		
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		21:7, 22:14-24:9.
4	91. In particular, Deborah Jay's	FOX'S RESPONSE:
5	survey results could not be generalized	Disputed. The opinion cited by
6	to a situation when a consumer searches	defendant is also immaterial, as its
7	for the <i>Empire</i> television show or its	expert presents no survey data showing
8	soundtrack or hip hop music generally	that his alleged criticism would have
9	on a platform like iTunes or Google Play	changed Dr. Jay's survey results or is
10	or Google search engine.	relevant to any issue in this case.
11		
12		<b>Defendant's Evidence:</b>
13		Bowler Decl., ¶ 7, Ex. 72 (Expert
14		Report of Dr. Joel H. Steckel) at p.9,
15		¶22
16		Foyla Fyidonoo
17		Fox's Evidence:
18	02 Dehomeh Lov's symvey connet he	Lens Decl., Ex. 8
19	92. Deborah Jay's survey cannot be	FOX'S RESPONSE:
20	used to measure confusion amongst the	Disputed. The opinion cited by
21	subset of consumers who participate in	defendant is also immaterial, as its
22	the activities mentioned above.	expert presents no survey data showing
23		that his alleged criticism would have
24		changed Dr. Jay's survey results or is
25		relevant to any issue in this case.
26		
27		<b>Defendant's Evidence:</b>

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Bowler Decl., ¶ 7, Ex. 72 (Expert
4		Report of Dr. Joel H. Steckel) at p.9,
5		¶22
6		
7		Fox's Evidence:
8		Lens Decl., Ex. 8
9	93. Deborah Jay's survey did not	FOX'S RESPONSE:
10	account for the <i>Empire</i> Series Music.	Disputed. Defendant's cited evidence
11		does not support this purported fact.
12		This purported fact is also immaterial,
13		as Dr. Jay's survey used a
14		representative stimulus.
15		
16		<u>Defendant's Evidence</u> :
17		Bowler Decl., ¶ 5, Ex. 70 (Jay
18		Deposition Transcript) at 20:2-3, 20:6-
19		11, 20:16-21:18, 21:23, 21:25-22:15,
20		22:19-23:4.
21		Fox's Evidence:
22		Lens Decl., Ex. 8
23		Lens Reply Decl., Ex. 27 (D. Jay
24		Depo.) at 18:1-18, 19:13-24, 20:20-
25		21:7, 22:14-24:9.
26	94. Record labels are important to	FOX'S RESPONSE:
27	consumers of rap, hip hop, and R&B	Disputed. Impermissible opinion
28	tonouncis of rap, mp nop, and reed	EOV'S DEDI V STATEMENT OF

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		
4	music.	testimony. FRE 701. Improper bases
5		for expert opinion. FRE 703.
6		<u>Defendant's Evidence</u> :
7		Bowler Decl., ¶ 8, Ex. 73 (Expert
8		Report of Dr. Kristen J. Lieb) at ¶3, 12-
9		22, 46; McDaniels Decl. ¶¶ 9-14;
10		Douthit Decl. ¶¶ 7-10; Julien Decl. ¶¶
11		12-21; Shami Decl., ¶¶ 62-83
12		
13		Fox's Evidence:
14		Lens Decl., Ex. 7, p. 86-88.
15	95. EMPIRE is a well-known and	FOX'S RESPONSE:
16	respected label in the rap and hip hop	Disputed. Impermissible opinion
17	music genre/space.	testimony. FRE 701. Improper bases
18		for expert opinion. FRE 703.
19		
20		<b>Defendant's Evidence:</b>
21		Shami Decl., ¶¶ 6-21, 35-61; Bowler
22		Decl., ¶ 8, Ex. 73 (Expert Report of Dr.
23		Kristen J. Lieb) at ¶3, 24-33, 47;
24		McDaniels Decl. ¶¶ 4-8; Douthit Decl.
25		¶¶ 11-14; Julien Decl. ¶¶ 7-11;
26		McDaniels Decl. ¶¶ 4-8; Douthit Decl.
27		¶¶ 11-14; Julien Decl. ¶¶ 7-11

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3   4   5   6   7   8   9   10   11   12   13   14   15	96. EMPIRE receives significant press in industry and national publications.	Fox's Evidence: Lens Decl., Ex. 7, p. 88-89.  FOX'S RESPONSE: Disputed as to defendant's characterization of the articles identified in Bowler Decl. ¶ 3, Exs. 42-68 as "significant press." The articles speak for themselves.  Defendant's Evidence: Bowler Decl., ¶ 3, Exs. 42-68.
15 16 17 18 19 20 21 22 23 24 25 26 27	97. Some consumers are likely to be confused regarding the affiliation between EMPIRE's use of the brand or term "Empire" and Fox's use of the term "Empire" in connection with the <i>Empire</i> television series and sales of the <i>Empire</i> series music.	FOX'S RESPONSE:  Disputed. Impermissible opinion testimony. FRE 701. Improper bases for expert opinion. FRE 703. Further, defendant's cited evidence does not support this purported fact, as it does not involve instances of mistaken purchasing decisions and thus provides no evidence of actionable confusion.  Defendant's Evidence:  Bowler Decl., ¶ 8, Ex. 73 (Expert

FOX'S REPLY STATEMENT OF UNCONTROVERTED FACTS & CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	WATEMALTACIS	
4		Report of Dr. Kristen J. Lieb) at ¶3, 34-
		45, 48; McDaniels Decl. ¶¶ 15-17;
5		Douthit Decl. ¶¶ 14; Julien Decl. ¶¶ 22-
6		26; Shami Decl., ¶¶ 84, 92, 93, 94, 100,
7		114; Simon Decl. ¶¶ 2-3
8		Eowla Evidonos
9		Fox's Evidence:
10		Lens Decl., Ex. 8, p. 96.
11	98. On July 31, 2015, Fox served its	FOX'S RESPONSE:
12	Initial Disclosures pursuant to Fed. R.	Disputed. Relevance. FRE 401.
13	Civ. P. 26(a)(1) identifying only six	
14	individuals including: Geoff Bywater	<u>Defendant's Evidence</u> :
15	(SVP, Television Music); Jeremy	Villar Decl. ¶ 2, Ex. 25
16	Kaufman (VP, Intellectual Property, Fox	
17	Group Legal); Vibiana Molina (SVP,	
18	Business Affairs); Shannon Ryan (EVP,	
19	Marketing and Communications); Mei-	
20	lan Stark (SVP, Intellectual Property,	
21	Fox Group Legal); and Michael Thorn	
22	(EVP, Development).	
23	99. Shannon Ryan, whom Fox has not	FOX'S RESPONSE:
24	made available for deposition, has	Disputed. Relevance. FRE 401.
25	significant relevant knowledge regarding	Defendant's cited evidence does not
26	Empire Series Music marketing and	support this purported fact. Defendant
27	promotional efforts.	misstates the cited testimony in Bowler

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Decl. ¶ 4, Ex. 69 at 32:12-22. That
4		portion of the transcript states that Ms.
5		Ryan "is on the marketing team of
6		FBC" and that Mr. Bywater has
7		interactions with Ms. Ryan regarding
8		marketing opportunities for <i>Empire</i> .
9		
10		<b>Defendant's Evidence:</b>
11		Bowler Decl., ¶ 4, Ex. 69 at 32:12-22.
12		
13		
14	100. Fox has not yet produced a	FOX'S RESPONSE:
15	witness on the selection of the name	Disputed. Relevance. FRE 401.
16	"Empire" for the <i>Empire</i> Series.	Defendant's cited evidence does not
17		support this purported fact. Defendant
18		misstates the cited testimony in Bowler
19		Decl. ¶ 4, Ex. 69 at 45:23-47:1, 47:4.
20		That portion of the transcript states that
21		Mr. Bywater does not know how the
22		name "Empire" was selected for Fox's
23		television series, not that Fox has not
24		yet produced a witness on this topic.
25		
26		<b>Defendant's Evidence:</b>
27		Bowler Decl., ¶ 4, Ex. 69 at 45:23-47:1,

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		47:4.
4		
5	101. Fox has not yet produced a	FOX'S RESPONSE:
7	witness on whether Fox conducted	Disputed. Relevance. FRE 401.
8	trademark searches prior to adopting the	Defendant's cited evidence does not
9	name "Empire."	support this purported fact. Defendant
0		misstates the cited testimony in Bowler
1		Decl. ¶ 4, Ex. 69 at 49:13-15, 49:19.
12		That portion of the transcript states that
13		conducting trademark searches prior to
14		adopting the name "Empire" would not
15		be part of Mr. Bywater's job, not that
16		Fox has not yet produced a witness on
7		this topic.
8		
9		<b>Defendant's Evidence:</b>
20		Bowler Decl., ¶ 4, Ex. 69 at 49:13-15,
21		49:19.
22		
23	102. Fox has not yet provided a	FOX'S RESPONSE:
24	witness with knowledge of Fox's	Disputed. Relevance. FRE 401.
25	marketing spend on <i>Empire</i> Series	Defendant's cited evidence does not
26	Music.	support this purported fact. Defendant
27		misstates the cited testimony in Bowler
28		FOX'S REPLY STATEMENT OF

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Decl. ¶ 4, Ex. 69 at 150:3-9. That
4		portion of the transcript states that Mr.
5		Bywater did not know how much the
6		network spent marketing <i>Empire</i> and
7		that Shannon Ryan could probably
8		answer that question, not that Fox has
9		not yet produced a witness on this
10		topic.
11		topie.
12		Defendant's Evidence:
13		Bowler Decl., ¶ 4, Ex. 69 at 150:3-9.
14		, , , , , , , , , , , , , , , , , , , ,
15		
16	103. Fox has not produced the witness	FOX'S RESPONSE:
17	most knowledgeable regarding sales data	Disputed. Relevance. FRE 401.
18	for the <i>Empire</i> Series Music.	Defendant's cited evidence does not
19		support this purported fact. Defendant
20		misstates the cited testimony in Bowler
21		Decl. ¶ 4, Ex. 69 at 165:23-166:5,
22		166:11-15. That portion of the
23		transcript states that Mr. Bywater had
24		not looked at the current week's report
25		to see how many downloads there had
26		been to date of music released from the
27		second season of <i>Empire</i> and that
20		

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3		marketing would know more about the
4		reports than he would, not that Fox has
5		not yet produced a witness on this
6		topic.
/		
8		<b>Defendant's Evidence:</b>
9		Bowler Decl., ¶ 4, Ex. 69 at 165:23-
10		166:5, 166:11-15.
11		
12 13	104. There were many other	FOX'S RESPONSE:
14	individuals known to Fox who have	Disputed. Relevance. FRE 401. Lack
15	discoverable information who were not	of personal knowledge. FRE 602.
16	identified in Fox's Initial Disclosures	
17	including, for example, the creators and	<b>Defendant's Evidence:</b>
18	executive producers of the <i>Empire</i>	Villar Decl. ¶ 3
19	series, Daniel Strong and Lee Daniels,	
20	and other employees of Fox and	
21	Columbia Records who release music	
22	from the <i>Empire</i> series.	
23	105. Fox filed seven declarations in	FOX'S RESPONSE:
24	support of its Motion for Summary	Disputed. Lack of personal knowledge.
25	Judgment, five of which are purported	FRE 602.
26	percipient witnesses (Melissa Blazek,	
27	Geoff Bywater, Tracey Raftery, Andrew	<b>Defendant's Evidence:</b>

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	Ross, and Shannon Ryan) and two of	Villar Decl. ¶ 3
4	which are Fox's attorneys of record,	
5	Molly Lens and Farrah Reynolds of	
6	O'Melveny & Myers LLP.	
7	106. Three of the five (60%) percipient	FOX'S RESPONSE:
8	witnesses (Melissa Blazek, Tracey	Disputed. Relevance. FRE 401.
9	Raftery, and Andrew Ross) who	
10	submitted declarations in support of	<b>Defendant's Evidence:</b>
11	Fox's Motion for Summary Judgment	Villar Decl. ¶ 3
12	were not disclosed in Fox's Initial	
13	Disclosures Pursuant to Fed. R. Civ. P.	
14	26(a)(1).	
15	107. As of the date EMPIRE's	FOX'S RESPONSE:
16	opposition was due, Fox had not	Disputed. Relevance. FRE 401.
17	amended or supplemented its Initial	
18	Disclosures pursuant to Fed. R. Civ. P.	<u>Defendant's Evidence</u> :
19	26(e).	Villar Decl. ¶ 4
20		
21 22	108. Despite serving a First Request	FOX'S RESPONSE:
23	for Production of Documents on July 17,	Disputed. Relevance. FRE 401.
24	2015, Fox did not make its initial	Defendant further misstates and omits
25	production documents until on or about	important facts. First, Fox made its
26	December 7, 2015, nearly five months	initial production on December 4, not
27	later and just 9 days before filing its	December 7. Second, defendant
- '		,

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	Motion for Summary Judgment.	likewise made its initial production on
4	Wotton for Summary Judgment.	-
5		this date, and it was <i>Fox</i> who first
6		proposed a date for the parties' mutual
7		production of documents. Defendant
8		never proposed an earlier date. Finally,
9		defendant stipulated to the briefing
10		schedule for summary judgment after
11		receiving Fox's initial production.
12		
13		<b>Defendant's Evidence:</b>
14		Villar Decl. ¶ 7
15		Fox's Evidence:
16		Lens Reply Decl. ¶¶ 2-6.
17	109. Despite serving numerous	FOX'S RESPONSE:
18	subpoenas on August 11, 2015, and	Disputed. Relevance. FRE 401.
19	reaching agreement on the scope of	
20	production with Fox's counsel regarding	<b>Defendant's Evidence:</b>
21	Fox Music in October 2015 and	Villar Decl. ¶ 11
22	regarding Lee Daniels and Daniel Strong	
23	in November 2015, these witnesses have	
24	not produced a single document	
25	responsive to the subpoenas as of the	
26	date EMPIRE's opposition was due.	
27	110. As of the date EMPIRE's	FOX'S RESPONSE:

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	opposition was due, Fox has only made	Disputed. Relevance. FRE 401.
4	one percipient witness, Geoff Bywater,	Defendant misstates the facts in that
5	available for deposition.	Mr. Bywater was made available as
6		both a percipient witness and as Fox's
7		30(b)(6) witness on many topics.
8		Defendant further omits the fact that, at
9		defendant's request, Fox also made two
10		of its experts available for deposition
11		prior to the date defendant's opposition
12		was due.
13		
14		Defendant's Evidence:
15		Villar Decl. ¶ 20
16		, and the second
17		Fox's Evidence:
18		Lens Reply Decl. ¶¶ 6-9.
19		
20	111. As of the date EMPIRE's	FOX'S RESPONSE:
21	opposition was due, Fox had not	Disputed. Relevance. FRE 401.
22	provided any confirmed dates for the	
23	depositions of expert witnesses Ted	<b>Defendant's Evidence:</b>
24	Cohen and Erich Joachimsthaler.	Villar Decl. ¶ 25
25		Fox's Evidence:
26		Lens Reply Decl. ¶ 6-7.
27		Zens reprij zeen. 1107.
28		

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	112. EMPIRE is unable to present facts	FOX'S RESPONSE:
4	essential to oppose Fox's Motion for	Disputed. Impermissible legal
5		conclusion. FRE 701. Relevance.
6	Summary Judgment because the	FRE 401.
7	depositions, documents and other	TKE 401.
8	discovery that EMPIRE has requested	Defendant's Evidence
9	from Fox is directed at issues raised by  Fox in its Mation including but not	Defendant's Evidence:
10	Fox in its Motion including, but not	Villar Decl. ¶¶ 2-34
11	limited to, the origin and Fox's selection	Fox's Evidence:
12	of the <i>Empire</i> name; Fox's knowledge of	Lens Reply Decl. ¶¶ 2-9.
13	the EMPIRE marks (including Fox's	
14	trademark searches relating to the	
15	EMPIRE marks); Fox's marketing	
16	expenses and promotional efforts	
17	relating to the <i>Empire</i> series and <i>Empire</i>	
18	series music; sales data for the <i>Empire</i>	
19	series music; the strength of the remarks	
20	at issue; the proximity of the goods; the	
21	similarity of the marks; the evidence of	
22	actual and likely confusion; the	
23	marketing channels used; the type of	
24	goods and the degree of care likely to be	
25	exercised by the purchaser; Fox's intent	
26	in selecting the mark; and the likelihood	
27	of expansion of the product lines.	EOVIG DEGDONGE
28	113. Fox once owned a record label,	FOX'S RESPONSE:  FOX'S REPLY STATEMENT OF

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Disputed Palayones EDE 401
4	Fox Records, but it did not succeed	Disputed. Relevance. FRE 401.
5	because it was not "set up properly."	Defendant's cited evidence does not
6		support this purported fact. Defendant
7		misstates the cited testimony in Bowler
8		Decl. ¶ 4, Ex. 69 at 15:22, 16:3-7. That
		portion of the transcript states that Fox
9		records was a record label that was
10		disbanded, but does not state that Fox
11		owned this record label. Earlier in the
12		transcript, Mr. Bywater testifies that
13		Fox Records "was kind of an imprint
14		partnership deal" with BMG. Bowler
15		Decl. ¶ 4, Ex. 69 at 15:5-10.
16		
17		<b>Defendant's Evidence:</b>
18		Bowler Decl., ¶ 4, Ex. 69 (Bywater
19		Deposition Transcript) at 15:22, 16:3-7.
20		- * *
21		
22	114. Music has been a focus of Fox's	FOX'S RESPONSE:
23	business for years; for example, Geoff	Disputed. Relevance. FRE 401.
24	Bywater rose through the ranks at Fox to	Defendant's cited evidence does not
25	become Head of Music by working in	support this purported fact. Defendant
26	Fox's dedicated music department for	misstates the cited testimony in Bowler
27	film and television.	Decl. ¶ 4, Ex. 69 at 15:8-17:2, 17:6-
28		

_ <sub>1</sub>		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		19:9, 19:11-24, 20:2-5, and 21:16-22:2.
4		That portion of the transcript states that
5		Mr. Bywater worked on soundtracks in
6		Fox's film division and then on the
7		music that goes into television shows in
8		Fox's television division prior to
9		obtaining his current position, not that
10		"[m]usic has been a focus of Fox's
11		business for years."
12		
13		<b>Defendant's Evidence:</b>
14		Bowler Decl., ¶ 4, Ex. 69 at 15:8-17:2,
15		17:6-19:9, 19:11-19:24, 20:2-5, 21:16-
16		22:2
17		
18		
19	115. Music became such a major part	FOX'S RESPONSE:
20	of Fox's television business that Fox	Disputed. Relevance. FRE 401.
21	created a television music department	Defendant's cited evidence does not
22	separate from film.	support this purported fact. Defendant
23		misstates the cited testimony in Bowler
24		Decl. ¶ 4, Ex. 69 at 18:22-19:9 and
25		19:11-17. That portion of the transcript
26		states that television became a bigger
27		business generally, not that music
	I .	

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		became "a major part of Fox's
4		television business."
5		
6		<b>Defendant's Evidence:</b>
7		Bowler Decl., ¶ 4, Ex. 69 at 18:22-19:9,
8		19:11-17/
9		
10		
11	116. Fox, like any major record label,	FOX'S RESPONSE:
12	signs musical artists to extensive music	Disputed to the extent that defendant
13	contracts, including exclusive "360	suggests Fox acts "like any major
14	deals" which cover recording,	record label" and suggests that deals
15	publishing, merchandising, name and	that Fox signs with musical artists are
16	likeness rights, live concert touring	"extensive." Defendant's cited
17	rights, etc.	evidence does not support these
18		purported facts. Further disputed to the
19		extent this purported fact is incomplete
20		because Columbia, not Fox, has the
21		right to pick up options. Further
22		disputed to the extent defendant uses
23		"etc." This term is vague, ambiguous,
24		and unclear. Finally, disputed to the
25		extent that defendant suggests Fox
26		enters deals with musical artists not
27		associated with its television shows.

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3		Deals that Fox makes with musical
4		artists are related to Fox's television
5		shows. See, e.g., Bowler Decl. ¶ 4, Ex.
6		69 at 22:10-18, 23:4-6, 24:3-4, 24:8-12.
7		
8		<b>Defendant's Evidence:</b>
9		Bowler Decl., ¶ 4, Ex. 69 at 22:3-5,
10		22:10-18, 22:25-23:1, 23:4-6; 23:8-9,
11		23:14-24:4; 24:8-25:7, 25:11-23;
12		130:15-17, 130:20-22, 131:4-6; 132:2-
13		5, 132:14-17, 132:20-24, 133:2-5,
14		133:9-13, 133:15-16, 133:20, 133:24-
15		134:1, 134:9-10, 134:13-17, 134:20-
16		137:11; Bywater Exs. 10, 11
17		
18	117 5	EOMIC DECDONICE
19	117. Fox enters into contractual	FOX'S RESPONSE:
20	agreements that record labels	Disputed to the extent that defendant
21	traditionally enter into, including at least	suggests "record labels traditionally
22	artist agreements, label waiver	enter into" certain agreements.
23	agreements, songwriter agreements,	Defendant's cited evidence does not
24	publishing agreements, composer	support this purported fact. Further
25	agreements, licensing agreements, and	disputed to the extent defendant
26	remixer agreements, for the creation of	suggests "Fox enters into artist
27	Empire Series Music.	agreements, [and] label waiver

DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
	agreements." Defendant's cited
	evidence does not support this
	purported fact. Further disputed to the
	extent defendant uses the term
	"contractual agreements that record
	labels traditionally enter into." This
	term is vague and ambiguous.
	Defendant's Evidence:
	Bowler Decl., ¶ 4, Ex. 69 at 138:8-14,
	138:17-24; 139:20-140:11; 140:20-
	141:2; 142:19-143:4; 143:15-20; 144:8-
	17, 145:2-12; Bywater Exs. 10, 11, 12,
	13.
118. Fox is "develop[ing] talent" like a	FOX'S RESPONSE:
record label and cannot afford to "have	Disputed. Relevance. Fed. R. Evid.
them go someplace else," and therefore	401. Defendant's cited evidence does
requires its artists to sign extensive,	not support this purported fact.
exclusive music contracts with Fox.	Defendant misstates the testimony cited
	in Bowler Decl. ¶ 4, Ex. 69 at 24:14-
	25:5. Defendant suggests Fox currently
	"is 'develop[ing] talent' and
	therefore requires its artists to sign
	I18. Fox is "develop[ing] talent" like a record label and cannot afford to "have them go someplace else," and therefore requires its artists to sign extensive,

1		
1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		extensive, exclusive music contracts
4		with Fox." However, the cited
5		testimony refers to actions Fox took in
6		the past on the series <i>Glee</i> , which has
7		been off the air since March 2015. The
8		cited testimony does not refer to Fox's
9		actions with respect to <i>Empire</i> .
10		actions with respect to Empire
11		Defendant's Evidence:
12		Bowler Decl., ¶ 4, Ex. 69 at 24:14-25:5.
13		Bowlet Been, ii i, Em os de 2 m i 2 m
14		
15	119. Fox uses <i>Empire</i> to launch solo	FOX'S RESPONSE:
16	careers for its artists.	Disputed to the extent defendant
17		suggests that the purpose of <i>Empire</i> is
18		to launch solo careers for musical
19		artists. Defendant's cited evidence
20		does not support this purported fact.
21		Defendant misstates the testimony cited
22		in Bowler Decl. ¶ 4, Ex. 69 at 70:23-
23		71:4, 71:8-17, 71:20. That portion of
24		the transcript states that Fox hopes that
25		the show serves as a launching pad for
26		Empire's cast members, Yazz, Jussie,
27		and Serayah, to end up having solo

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		careers.
4		
5		Defendant's Evidence:
6		Bowler Decl., ¶ 4, Ex. 69 at 70:23-71:4,
7		71:8-17, 71:20.
8		
9		
10	120. Like a record label, Fox is seeking	FOX'S RESPONSE:
11	to locate and retain unknown musical	Disputed. Defendant's cited evidence
12	artist talent.	does not support this purported fact.
13		Mr. Bywater's testimony describes a
14		one-off "promotion, publicity contest"
15		that was "just another way of grabbing
16		some additional fun for the fans."
17		Bowler Decl. ¶ 4, Ex. 69 at 128:15-18.
18		Defendant's cited evidence does not
19		demonstrate any plan or strategy by
20		Fox "to locate and retain unknown
21		musical artist talent." Further, the
22		testimony does not purport to describe
23		how a record label acts. Finally,
24		defendant's use of the word "retain" is
25		misleading. The grand prize for this
26		contest was an <i>Empire</i> set visit and the
27		opportunity at Fox's discretion to

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		appear on one episode of <i>Empire</i> .
4		
5		<u>Defendant's Evidence</u> :
6		Bowler Decl., ¶ 4, Ex. 69 at 126:14-
7		127:18, 127:25-128:4, 128:12-129:15.
8		
9	121. Fox entities, known collectively	FOX'S RESPONSE:
11	as "Fox," own the rights to the <i>Empire</i>	Disputed to the extent that the terms
12	Series and the <i>Empire</i> Series Music.	"Fox entities" and "rights" are vague
13		and ambiguous. Impermissible legal
14		conclusion. Fed. R. Evid. 701.
15		
16		Defendant's Evidence:
17		Bowler Decl., ¶ 4, Ex. 69 at 26:12-15,
18		26:18-25, 27:4-8, 27:11, 27:16-21,
19		27:25-5; 100:11-14, 100:17-21.
20		
21	100 Fow's Funding Society Music Asses	EOVIC DECDONCE.
22	122. Fox's <i>Empire</i> Series Music team	FOX'S RESPONSE:  Disputed Defendant's sited evidence
23	collaborates with Fox Broadcasting	Disputed. Defendant's cited evidence
24	Company to market <i>Empire</i> Series	does not support this purported fact.
25	Music through appearances on TV, and	Defendant misstates the cited
26	by providing music to content providers	testimony. Defendant's counsel asked
27	on a regular basis for radio and online	Mr. Bywater whether his team
28	advertising.	collaborates "with the marketing team  FOX'S REPLY STATEMENT OF

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	SOIT ORTHOGETIBETICE
3		at FBC as it relates to the 'Empire'
4		show." This question and Mr.
5		Bywater's answer relate to the <i>Empire</i>
6		series, not to whether Mr. Bywater's
7		team collaborates with Fox
8		Broadcasting Company to market
9		Empire Series Music.
10		
11		<b>Defendant's Evidence</b> :
12		Bowler Decl., ¶ 4, Ex. 69 at 32:2-11.
13		
14	102 5	
15	123. Fox maintains a merchandising	Undisputed.
16	business unit that is responsible for	
17	creating "Empire" branded merchandise,	
18	which consists of promotional items.	EOMIC DECDONICE
19	124. The music model for Fox's	FOX'S RESPONSE:
20	massively popular musical television	Disputed. Relevance. FRE 401.
21	show "GLEE" is similar to the music	Defendant's cited evidence does not
22	model for <i>Empire</i> , and served as the	support this purported fact. Defendant
23	"prototype" for <i>Empire</i> .	misstates the cited testimony in Bowler
24		Decl. ¶ 4, Ex. 69 at 34:9-10, 34:13-14.
25		That portion of the transcript states that
26		the music model for <i>Empire</i> is similar
27		to the music model for <i>Glee</i> and that

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		"Glee kind of became the prototype for
4		Empire."
5		
6		<b>Defendant's Evidence:</b>
7		Bowler Decl., ¶ 4, Ex. 69 at 34:9-10,
8		34:13-14.
9		
10		
11	125. "GLEE" demonstrated the	FOX'S RESPONSE:
12	significant business potential associated	Disputed. Relevance. FRE 401.
13	with using music on television.	Defendant's cited evidence does not
14		support this purported fact. Defendant
15		misstates the cited testimony in Bowler
16		Decl. ¶ 4, Ex. 69 at 34:16-22. That
17		portion of the transcript states "[Glee]
18		just showed what can happen when
19		television uses music in a super great
20		way. You know, when Empire came
21		along, people looked at it and said this
22		looks like it's the same kind of
23		television show, only from more of an
24		African-American position."
25		
26		<b>Defendant's Evidence:</b>
27		Bowler Decl., ¶ 4, Ex. 69 at 34:16-22.
-		

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		
4		
5	126. Fox partners with Columbia	FOX'S RESPONSE:
6	Records to release music for "GLEE"	Disputed to the extent that any
7	and <i>Empire</i> .	partnership with Columbia Records for
8		Glee is in the past as Glee is off the air.
9		Relevance. FRE 401.
10		
11		<u>Defendant's Evidence</u> :
12		Bowler Decl., ¶ 4, Ex. 69 at 34:23-35:1,
13		35:8-9, 35:12.
14		
15	127. Unlike "GLEE," <i>Empire</i> creates	FOX'S RESPONSE:
16	almost all original music geared toward	Disputed. Relevance. FRE 401.
17	the urban music genres.	
18		<b>Defendant's Evidence:</b>
19		Bowler Decl., ¶ 4, Ex. 69 at 36:6-11;
20		36:24-25; 37:3-7, 50:5, 50:8-9, 51:10-
21		11, 51:16-52:1.
22		
23	100 E . C . M .	EONIC DECDONCE
24	128. <i>Empire</i> Series Music was	FOX'S RESPONSE:
25	designed fill a gap in the marketplace,	Disputed. Defendant's cited evidence
26	and has therefore significantly	does not support this purported fact.
27	contributed to <i>Empire</i> 's success.	Defendant misstates the cited

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		testimony. The cited testimony of Mr.
4		Bywater says nothing about a gap in
5		the marketplace. Further, defendant's
6		counsel asked about the <i>Empire</i> series,
7		and Mr. Bywater's answer is about "the
8		success of the show," not about the
9		Empire Series Music.
10		
11		<b>Defendant's Evidence:</b>
12		Bowler Decl., ¶ 4, Ex. 69 at 36:12-23.
13		
14		
		EOXIG DECDONGE
15	129. The <i>Empire</i> Series and <i>Empire</i>	FOX'S RESPONSE:
15 16	129. The <i>Empire</i> Series and <i>Empire</i> Series Music is targeted toward African	FOX'S RESPONSE:  Disputed to the extent that defendant's
	1	
16	Series Music is targeted toward African	Disputed to the extent that defendant's
16 17	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the
16 17 18	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series
16 17 18 19	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted
16 17 18 19 20	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted toward African Americans. Defendant
16 17 18 19 20 21	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted toward African Americans. Defendant mischaracterizes the cited testimony.
16 17 18 19 20 21 22	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted toward African Americans. Defendant mischaracterizes the cited testimony.  Mr. Bywater stated the show has strong
16 17 18 19 20 21 22 23	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted toward African Americans. Defendant mischaracterizes the cited testimony.  Mr. Bywater stated the show has strong African American appeal, Bowler Decl.
16 17 18 19 20 21 22 23 24	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted toward African Americans. Defendant mischaracterizes the cited testimony.  Mr. Bywater stated the show has strong African American appeal, Bowler Decl.  ¶ 4, Ex. 69 at 54:16-19, and that the
16 17 18 19 20 21 22 23 24 25	Series Music is targeted toward African Americans and over-performs in larger	Disputed to the extent that defendant's cited evidence does not support the purported fact that the <i>Empire</i> Series and <i>Empire</i> Series Music are targeted toward African Americans. Defendant mischaracterizes the cited testimony.  Mr. Bywater stated the show has strong African American appeal, Bowler Decl.  ¶ 4, Ex. 69 at 54:16-19, and that the purpose of understanding

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		resonates, <i>id.</i> at 55:24-56:1, 56:5-8, but
4		he never testified that <i>Empire</i> and the
5		Soundtracks are targeted toward
6		African Americans.
7		
8		<b>Defendant's Evidence:</b>
9		Bowler Decl., ¶ 4, Ex. 69 at 54:8-22,
10		54:25-55:9, 55:13-15, 55:24-56:1, 56:5-
11		8; 106:11-24.
12		
13		
14	130. The <i>Empire</i> Series Music concept	Undisputed.
15	was developed early in the Empire	
16	Series development process.	
17	131. Fox uses original music for	FOX'S RESPONSE:
18	Empire as opposed to licensed non-	Disputed. Hearsay. FRE 801, 802.
19	original music at least because it allows	Defendant's cited evidence does not
20	Fox to use the song in advertising not	support this purported fact. Defendant
21	only for the <i>Empire</i> Series but for "any	misstates the cited testimony. Mr.
22	of its ancillary businesses."	Bywater describes the "benefits" of
23		using original music for <i>Empire</i> . These
24		benefits include the ability to use the
25		music in advertising. However, this is
26		not the reason why Fox uses original
27		music in <i>Empire</i> . When asked, "Why
•		

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		does Fox use original music for
4		"Empire"?", Mr. Bywater
5		responded, "Well, it was the vision of
6		the show creators, Lee Daniels and
7		Danny Strong, and it was the way we
8		were going to make the show from the
9		very beginning." Bowler Decl. ¶ 4, Ex.
10		69 at 37:9-11, 37:15-18. In other
11		words, there were creative and artistic
12		reasons for using original music in
13		Empire.
14		
15		<b>Defendant's Evidence:</b>
16		Bowler Decl., ¶ 4, Ex. 69 at 37:22-23,
17		38:2-10, 38:25-39:5, 39:7-13, 39:18-22;
18		66:24-67:5, 67:8-21, 70:2-17, 70:21;
19		Bywater Exs. 3,4
20		
21		Fox's Evidence:
22		Bowler Decl. ¶ 4, Ex. 69 at 37:9-11,
23		37:15-18.
24	132. Timbaland, a well-respected	Undisputed.
25	musical artist and producer, is the	_
26	executive music producer for <i>Empire</i>	
27	Series Music.	

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	133. Timbaland works with a team of	FOX'S RESPONSE:
4	established music industry partners to	Disputed to the extent that defendant's
5	write, produce and finalize the <i>Empire</i>	cited evidence does not support the
6	Series Music for distribution to	purported fact that music is written,
7	consumers.	produced, and finalized "for
8		distribution to consumers." Defendant
9		misstates the cited testimony. Mr.
10		Bywater testified that Timbaland and
11		his team write music "for a TV show,"
12		rather than for distribution to
13		consumers.
14		
15		<b>Defendant's Evidence:</b>
16		Bowler Decl., ¶ 4, Ex. 69 at 62:6-9,
17		62:12-63:2, 63:11-12, 63:16-64:1, 65:4-
18		6, 65:9-11.
19		
20	104 5 1 1 6	FOXEG PEGPONGE
21	134. Fox releases three to five songs	FOX'S RESPONSE:
22	used in each episode of the <i>Empire</i>	Disputed to the extent that defendant's
23	Series.	cited evidence does not support the
24		purported fact that Fox "releases" three
25		to five songs used in each episode.
26		Defendant misstates the cited
27		testimony. Rather, in the cited

1			
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE	
3		testimony, Mr. Bywater testified that	
4		there are three to five songs per episode	
5		of <i>Empire</i> . Further disputed to the	
6		extent that Fox is not the entity that	
7		releases the <i>Empire</i> music. Rather,	
8		Columbia Records releases the <i>Empire</i>	
9		music. Bowler Decl. ¶ 4, Ex. 69 at	
10		98:11-14.	
11			
12		Defendant's Evidence:	
13		Bowler Decl., ¶ 4, Ex. 69 at 58:17-19.	
14		·	
15		Fox's Evidence:	
16		Bowler Decl. ¶ 4, Ex. 69 at 98:11-14.	
17	135. <i>Empire</i> Series Music is often	Undisputed.	
18	released before the Empire Series	1	
19	episode is aired.		
20	136. Approximately 65 songs are	Undisputed.	
21	released per season of the <i>Empire</i> Series.		
22	137. Consumers recognize <i>Empire</i>		
23	Series Music by the song title.	Undisputed.	
24	and some some some		
25	138. <i>Empire</i> Series Music is marketed	Undisputed.	
26	to and available to all consumers, not	Champatou.	
27	just consumers who have seen the		

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	Empire Series television show.	
4	139. A team of writers consults with	FOX'S RESPONSE:
5	Fox regarding the way that real-life	Disputed. Defendant's cited evidence
6	record labels operate.	does not support the purported fact that
7		a team of writers consults with Fox
8		regarding the way that real-life record
9		labels operate.
10		
11		<b>Defendant's Evidence:</b>
12		Bowler Decl., ¶ 4, Ex. 69 at 48:22-25,
13		49:3-5.
14		
15	140 The Empire Series depicts entists	EOVIC DECDONCE.
16	140. The <i>Empire</i> Series depicts artists	FOX'S RESPONSE:
17	creating original songs in a recording	Disputed. Defendant's cited evidence
18	studio.	does not support this purported fact.
19		Defendant misstates the cited testimony
20		in Bowler Decl. ¶ 4, Ex. 69 at 61:22-25.
21		That portion of the transcript states that
22		the story line of <i>Empire</i> sometimes has
23		the <i>character actors</i> in the recording
24		studio.
25		
26		<b>Defendant's Evidence</b> :
27		Bowler Decl., ¶ 4, Ex. 69 at 61:22-25.

D	EFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
141.	The <i>Empire</i> Series depicts artists	FOX'S RESPONSE:
givii	ng live performances.	Disputed. Defendant's cited evidence
		does not support this purported fact.
		Defendant misstates the cited testimony
		in Bowler Decl. ¶ 4, Ex. 69 at 62:1-3.
		That portion of the transcript states that
		the story line of <i>Empire</i> sometimes has
		the character actors giving live
		musical performances.
		<b>Defendant's Evidence:</b>
		Bowler Decl., ¶ 4, Ex. 69 at 62:1-3.
142.	Real-life musical artists appear on	FOX'S RESPONSE:
	release songs through <i>Empire</i> .	Disputed. Defendant's cited evidence
		does not support this purported fact.
		Defendant misstates the cited testimony
		in Bowler Decl. ¶ 4, Ex. 69 at 72:24-13.
		That portion of the transcript states that
		Empire has real-life musical artists
		make guest appearances on the show
		and that Snoop Dogg debuted his single
		"Peaches N Cream" on the show, not
		FOX'S REPLY STATEMENT OF

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		that real-life musical artists "release
4		songs through <i>Empire</i> ." Indeed, the
5		transcript later notes that this single
6		was released a week or two before
7		Snoop Dogg appeared on the show.
8		
9		<b>Defendant's Evidence:</b>
10		Bowler Decl., ¶ 4, Ex. 69 at 72:24-13.
11		
12		Fox's Evidence:
13		Bowler Decl. ¶ 4, Ex. 69 at 93:1-4.
14	143. Real-life musical artists appear on	Undisputed.
15	Empire to "bring more reality into the	1
16	show."	
17	144. Real-life rapper Snoop Dogg	FOX'S RESPONSE:
18	appeared on <i>Empire</i> as himself to release	Disputed. Lack of personal knowledge.
19	in real-life on iTunes an independently	FRE 602. Impermissible hearsay. FRE
20	created single called "Peaches N Cream"	801, 802. Defendant's cited evidence
21	that was portrayed as being recorded at	does not support this purported fact.
22	and released in partnership with <i>Empire</i> .	Defendant misstates the cited testimony
23		in Bowler Decl. ¶ 4, Ex. 69 at 89:10-25,
24		90:1, 90:8-14, 91:2-3, 91:6-7, 91:10-17,
25		92:4-7, 92:10-19, and 93:1-11 and
26		Bywater Ex. 7. That portion of the
27		transcript states that Snoop Dogg's

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$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
	MATERIAL FACTS	
3		single "Peaches N Cream" was released
4		a week or two before the episode on
5		which Snoop Dogg appeared, not that
6		Snoop Dogg released this single on the
7		show. That portion of the transcript
8		further states that Mr. Bywater did not
9		remember the story line with respect to
10		Snoop Dogg, not that Snoop Dogg's
11		single "was portrayed as being
12		recorded at and released in partnership
13		with <i>Empire</i> ."
14		1
15		Defendant's Evidence:
16		Bowler Decl., ¶ 4, Ex. 69 at 89:10-25,
17		90:1, 90:8-14, 91:2-3, 91:6-7, 91:10-17,
18		92:4-7, 92:10-19; 93:1-11; Bywater Ex.
19		7.
20		7.
21		
22	145. Duets with real-life artists	FOX'S RESPONSE:
23	improve sales of <i>Empire</i> Series Music.	Disputed. Defendant's cited evidence
24		does not support this purported fact.
25		Defendant misstates the cited testimony
26		in Bowler Decl. ¶ 4, Ex. 69 at 124:21-
27		125:16. That portion of the transcript

1		
1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	WINTERNIE THE IS	
4		states that
5		
6		
7		
8		
9		
10		That portion of the transcript
11		does not make any general statement
12		about real-life artists improving the
13		sales of <i>Empire</i> series music.
14		Defendant's Evidence:
15		Bowler Decl., ¶ 4, Ex. 69 at 124:21-
16		125:16.
17		123.10.
18		
19	146. Fox values having talent that	Undisputed.
20	could "hold up their own in music" to	Charspated.
21	lend authenticity and realism to the	
22	Empire Series.	
23	147. Empire is "really deep in the	FOX'S RESPONSE:
24	world of music" and Fox wants "to	Disputed. Impermissible hearsay. FRE
25	make that world feel very real."	801, 802.
26		
27		<b>Defendant's Evidence:</b>
20		

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	SULLOKIING EVIDENCE
3		Bowler Decl., ¶ 4, Ex. 69 at 83:25-84:7,
4		84:11-21; Bywater Ex. 6.
5		
6	148. Fox partners with Columbia to	FOX'S RESPONSE:
7 8	release <i>Empire</i> Series Music in popular	Disputed. Defendant's cited evidence
9	formats (digital and physical) and	does not support this purported fact.
10	through traditional distribution channels	Defendant misstates the cited testimony
11	(i.e., iTunes, Spotify, Pandora, Walmart,	in Bowler Decl. ¶ 4, Ex. 69 at 94:21-23,
12	Target, etc.).	95:1-19, 95:22-97:9, 99:2-99:15, 99:18-
13		100:10, 101:8-102:13, 108:11-13, and
14		108:16-23. That portion of the
15		transcript states that Fox provides the
16		songs from each episode of <i>Empire</i> to
17		Columbia, and Columbia then releases
18		and distributes the music. That portion
19		of the transcript further states that Fox
20		has no role in the distribution of the
21		music, not that "Fox partners with
22		Columbia to release <i>Empire</i> series
23		music."
24		
25		<b>Defendant's Evidence:</b>
26		Bowler Decl., ¶ 4, Ex. 69 at 94:21-23,
27		95:1-19, 95:22-97:9, 99:2-99:15, 99:18-

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1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		100:10; 101:8-102:13; 108:11-13,
4		108:16-23.
5		
6 7	149. Fox contemplated rolling out a	FOX'S RESPONSE:
8	digital-only format for the Empire Series	Disputed. Relevance. FRE 401.
9	Music.	Inadmissible hearsay. FRE 801, 802.
10		
11		<b>Defendant's Evidence:</b>
12		Bowler Decl., ¶ 4, Ex. 69 at 104:13-22;
13		105:7-22; Bywater Ex. 8.
14		
15	150. Empire Series Music has appeared	
16	on the Billboard Top 100 and 200 charts,	Undisputed.
17	including at No. 1, as well as urban, rap,	
18	R&B, and hip hop genre-specific charts.	
	151. Empire Series Music has appeared	Undisputed.
20	on iTunes hip hop, urban, and album	Ondisputed.
21	charts.	
22	152. Fox has sold just under 500,000	FOX'S RESPONSE:
23	physical albums of <i>Empire</i> Series Music.	Disputed. Defendant's cited evidence
24		does not support this purported fact.
25		Defendant misstates the cited testimony
26		in Bowler Decl. ¶ 4, Ex. 69 at 163:1-3,
27		163:10-164:1. That portion of the
28		FOX'S REPLY STATEMENT OF

FOX'S REPLY STATEMENT OF UNCONTROVERTED FACTS & CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)

1		
1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		transcript does not state that Fox, as
4		opposed to Columbia, sold any physical
5		albums of <i>Empire</i> Series Music. With
6		respect to the number of sales, that
7		portion of the transcript states that
8		65,000 physical copies of the
9		soundtrack album from Season 2 and
10		around 430,000 units, combined digital
11		and physical, of the soundtrack album
12		from Season 1 were sold, with
13		approximately 60% of these sales being
14		physical. The transcript thus states that
15		the total number of <i>physical</i> albums
16		sold is approximately 320,000, not
17		500,000.
18		
19		<b>Defendant's Evidence:</b>
20		Bowler Decl., ¶ 4, Ex. 69 at 163:1-3,
21		163:10-164:1.
22		
23		Fox's Evidence:
24		Bywater Decl. ¶ 3; Ross Decl. ¶¶ 2-5.
25	153. Fox has sold approximately 3	FOX'S RESPONSE:
26	million downloads comprising	Disputed. Defendant's cited evidence
27	individual track sales of <i>Empire</i> Series	does not support this purported fact.

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	Music.	Defendant misstates the cited testimony
4		in Bowler Decl. ¶ 4, Ex. 69 at 164:5-7,
5		164:11-24, 165:15-16, and 165:19-21.
6		That portion of the $Fox$ , as opposed to
7		Columbia, sold any downloads
8		comprising individual track sales of
9		Empire Series Music.
10		
11		<b>Defendant's Evidence:</b>
12		Bowler Decl., ¶ 4, Ex. 69 at 164:5-7,
13		164:11-164:24, 165:15-16, 165:19-21.
14		
15		Fox's Evidence:
16		Bywater Decl. ¶ 3; Ross Decl. ¶¶ 2-5.
17	154. The largest consumption of	Undisputed.
18	Empire Series Music is through	
19	streaming services such as Spotify.	
20	155. <i>Empire</i> Series Music has been	Undisputed.
21	streamed well over 100 million times.	
22	156. Empire Series Music sells for	
23	approximately \$13 per album, and \$1	Undisputed.
24	per song.	
25	157. Fox monitors sales data for the	FOX'S RESPONSE:
26	Empire Series Music through platforms	Disputed. Relevance. FRE 401.
27	such as SoundScan.	Defendant's cited evidence does not
28		FOX'S REPLY STATEMENT OF

FOX'S REPLY STATEMENT OF UNCONTROVERTED FACTS & CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)

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Bowler
Bowler
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pt states
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ts from
rs sales
1:18-25,
vidence
fact.
estimony
120:18-
147:12,
5. That
ot state

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		that Fox "has entered into an
4		unexecuted profit-sharing agreement
5		with Columbia Records" but rather
6		notes that Fox has no signed agreement
7		with Columbia and describes the
8		principle deal points of the draft
9		agreement with Columbia.
10		
11		<b>Defendant's Evidence:</b>
12		Bowler Decl., ¶ 4, Ex. 69 at 120:18-
13		121:18; 122:13-123:1, 146:21-147:12;
14		148:8-24, 149:6-12, 149:15; Bywater
15		Exs. 14, 15
16		
17	150	EOVIC DECDONCE.
18	159. Fox's first distribution of	FOX'S RESPONSE:
19	under its agreement with	Disputed. Defendant's cited evidence
20	Columbia was for approximately	does not support this purported fact.
21		Defendant misstates the cited testimony
22		in Bowler Decl. ¶ 4, Ex. 69 at 158:5-8.  That portion of the transcript states that
23		That portion of the transcript states that
24		
25		
26		
27		

1		
2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		Defendant's Evidence:
4		Bowler Decl., ¶ 4, Ex. 69 at 158:5-8,
5		158:11-21.
6		
7		
8	160. Like "GLEE," Fox intends	FOX'S RESPONSE:
9	Empire to become a big piece of the	Disputed. Relevance. FRE 401.
10	music business through touring and	Defendant's cited evidence does not
11	marketing.	support this purported fact. Defendant
12		misstates the cited testimony in Bowler
13		Decl. ¶ 4, Ex. 69 at 85:3-10, 85:14-17.
14		That portion of the transcript states that
15		Glee became a big piece of music
16		business and big piece of TV business
17		and that Mr. Bywater "was comparing
18		the early success of 'Empire' to the
19		things [Fox] learned through 'Glee' and
20		in the area of touring and marketing,"
21		not that Fox intends Empire to become
22		a big piece of the music business
23		through touring and marketing. In fact,
24		there has been no touring with <i>Empire</i> .
25		
26		<b>Defendant's Evidence:</b>
27		Bowler Decl., ¶ 4, Ex. 69 at 85:3-10,

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3 4		85:14-17.
5		Fox's Evidence:
6		Bowler Decl. ¶ 4, Ex. 69 at 85:22,
7		85:25.
8	161. A dedicated marketing plan is	FOX'S RESPONSE:
9	created with respect to the <i>Empire</i> Series	Disputed to the extent defendant
10	Music.	suggests that Fox, rather than
11		Columbia, creates the marketing plan
12		for the <i>Empire</i> series music.
13		Defendant's cited evidence indicates
14		that Columbia creates this marketing
15		plan.
16		
17		<b>Defendant's Evidence:</b>
18		Bowler Decl., ¶ 4, Ex. 69 at 123:12-
19		124:3.
20		
21	162. Fox maintains approval rights	FOX'S RESPONSE:
22	over the marketing plan for the <i>Empire</i>	Disputed to the extent defendant
23	Series Music.	suggests that Fox maintains approval
24		rights over the marketing plan as a
25		whole for the <i>Empire</i> series music.
26		Defendant's cited evidence indicates
27		that Fox has approval rights over
28		FOX'S REPLY STATEMENT OF

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		certain aspects of the marketing plan,
4		not the marketing plan as a whole.
5		
6		<b>Defendant's Evidence:</b>
7		Bowler Decl., ¶ 4, Ex. 69 at 155:16-24,
8		156:2-23; Bywater Exs. 23, 25.
9		
10 11	163. Fox has considered a live concert	FOX'S RESPONSE:
12	tour for <i>Empire</i> Series music, in which	Disputed. Relevance. FRE 401.
13	Columbia will have no stake.	Defendant's cited evidence does not
14		support this purported fact. Defendant
15		misstates the cited testimony in Bowler
16		Decl. ¶ 4, Ex. 69 at 86:12-14, 86:17-24,
17		87:3-11. This portion of the transcript
18		states that Fox "had early discussions"
19		regarding a tour with the actors from
20		the show but is "not doing it."
21		
22		<b>Defendant's Evidence:</b>
23		Bowler Decl., ¶ 4, Ex. 69 at 86:12-14,
24		86:17-24; 87:3-11.
25		
26	164. Fox has promoted <i>Empire</i> Series	FOX'S RESPONSE:
27	Music at the South by Southwest music	Disputed. Relevance. FRE 401. Lack
28		FOX'S REPLY STATEMENT OF

1 2	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	festival.	of personal knowledge. FRE 602.
4		Defendant's cited evidence does not
5		support this purported fact. Defendant
6		misstates the cited testimony in Bowler
7		Decl. ¶ 4, Ex. 69 at 189:16-190:7,
8		190:10-12 and Bywater Ex. 24. That
9		portion of the transcript states that it
10		"looks like" Fox sent bus wraps to the
11		South by Southwest festival, but does
12		not specify whether these bus wraps
13		contained ads/promotions for Empire
14		series music as opposed to the <i>Empire</i>
15		show.
16		
17		<b>Defendant's Evidence:</b>
18		Bowler Decl., ¶ 4, Ex. 69 at 189:16-
19		190:7, 190:10-12; Bywater Ex. 24.
20		
21	165. Fox seeks and enters into	FOY'S DESDONSE.
22		FOX'S RESPONSE: Disputed Polyance EPE 401
23	promotional partnerships involving <i>Empire</i> Series Music, including with	Disputed. Relevance. FRE 401.  Impermissible hearsay. FRE 801, 802.
24		Defendant's cited evidence does not
25	Pepsi.	
26		support this purported fact. Defendant
27		misstates the cited testimony in Bowler

_		
$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	WATERIAL FACTS	
		Decl. ¶ 4, Ex. 69 at 196:11-197:6 and
4		Bywater Ex. 27. This portion of the
5		transcript states that Pepsi is a sponsor
6		for the show and a Pepsi commercial
7		featuring a song from one of the actors
8		on the show was written into a few
9		episodes of the show, not that Fox
10		enters into promotional partnerships
11		involving <i>Empire</i> series music, separate
12		and apart from the show.
13		_
14		Defendant's Evidence:
15		Bowler Decl., ¶ 4, Ex. 69 at 196:11-
16		197:6; Bywater Ex. 27.
17		, ,
18		
19	166. Fox has promoted <i>Empire</i> Series	FOX'S RESPONSE:
20	Music on the BET television channel,	Disputed. Relevance. FRE 401. Lack
21	including via live performances.	of personal knowledge. FRE 602.
22		Impermissible hearsay. FRE 801, 802.
23		Defendant's cited evidence does not
24		support this purported fact. Defendant
25		misstates the cited testimony in Bowler
26		Decl. ¶ 4, Ex. 69 at 200:10-11, 200:18-
27		201:5. That portion of the transcript
- '		

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3	WATERIAL FACTS	
		states that cast members from <i>Empire</i>
4		have performed on BET awards shows,
5		not that Fox has promoted music
6		released from the <i>Empire</i> series on
7		BET.
8		
9		<b>Defendant's Evidence:</b>
10		Bowler Decl., ¶ 4, Ex. 69 at 200:10-11,
11		200:18-201:5; Bywater Ex. 29.
12		
13		
14	167. <i>Empire</i> is promoted on iHeart	Undisputed.
15	Radio.	
16	168. Fox intends <i>Empire</i> to build a	FOX'S RESPONSE:
17	music business and consumer products	Disputed. Lack of personal knowledge.
18	brand.	FRE 602. Impermissible hearsay. FRE
19		801, 802. Defendant's cited evidence
20		does not support this purported fact.
21		Defendant misstates the cited testimony
22		in Bowler Decl. ¶ 4, Ex. 69 at 208:3-6
23		209:15-24, 210:4-5, 210:8-14. That
24		portion of the transcript states that Mr.
25		Bywater believes that Mr. Melnick's
26		suggestion that Brian Grazer tell Jimmy
27		Iovine that "Timbaland and his music
28		FOX'S REPLY STATEMENT OF

$\begin{bmatrix} 1 \\ 2 \end{bmatrix}$	DEFENDANT'S ADDITIONAL MATERIAL FACTS	SUPPORTING EVIDENCE
3		team are crushing it (soundtrack data)
4		and we're building a music business
5		and consumer products brand" is "just
6		hype talk."
7		nype tank.
8		Defendant's Evidence:
9		Bowler Decl., ¶ 4, Ex. 69 at 208:3-6;
10		209:15-24, 210:4-5, 210:8-14; Bywater
11		Ex. 30.
12		Ex. 50.
13		
14	169. Fox's Head of Music, Geoff	FOX'S RESPONSE:
15	Bywater, is familiar with a number of	Disputed. Impermissible opinion
16	EMPIRE's very famous clients,	testimony. FRE 701. Relevance. FRE
17	including some that have been pitched to	401.
18	appear on or have actually appeared on	
19	the Empire Series.	<b>Defendant's Evidence:</b>
20		Bowler Decl., ¶ 4, Ex. 69 at 202:1-
21		205:3.
22		
23	170. EMPIRE pled a forward and	FOX'S RESPONSE:
24	reverse confusion case.	Disputed. Impermissible legal
25		conclusion. FRE 701. Defendant's
26		cited evidence does not support this
27		purported fact.

1	DEFENDANT'S ADDITIONAL	SUPPORTING EVIDENCE
2	MATERIAL FACTS	
3		
4		Defendant's Evidence:
5		Bowler Decl., ¶¶ 10-11.
6		2 0 W 202 2 002 1,       1 0 1 2 1
7		Fox's Evidence:
8		Lens Decl. ¶ 7.
9	171. Fox was aware of EMPIRE's	FOX'S RESPONSE:
10	forward and reverse confusion claims.	Disputed. Lack of personal knowledge.
11		FRE 602. Defendant's cited evidence
12		does not support this purported fact.
13		
14		<b>Defendant's Evidence:</b>
15		Bowler Decl., ¶¶ 10-12.
		7 11 11
16		Fox's Evidence:
17		Lens Decl. ¶ 7.
18		

## CONCLUSIONS OF LAW<sup>1</sup>

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As set forth in Fox's summary judgment papers and Proposed Judgment:

- 1. Courts in this District have granted summary judgment in cases involving the interplay of the Lanham Act and First Amendment. *See, e.g., E.S.S. Entm't 2000 v. Rock Star Videos*, 547 F.3d 1095, 1099, 1101 (9th Cir. 2008); *Novalogic, Inc. v. Activision Blizzard*, 41 F. Supp. 3d 885, 901 (C.D. Cal. 2013).
  - 2. Courts in the Ninth Circuit evaluate trademark infringement claims

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FOX'S REPLY STATEMENT OF UNCONTROVERTED FACTS & CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)

<sup>&</sup>lt;sup>1</sup> Defendant has not filed any response to the Conclusions Of Law. Fox includes them herein in order to provide the Court with one comprehensive document.

- 3. Under the *Rogers* test, the Lanham Act does not apply to artistic works unless "[1] the title has no artistic relevance to the underlying work whatsoever, or, [2] if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work." *Rogers*, 875 F.2d at 999.
- 4. *Empire* and its Soundtracks are core expressive works protected by the First Amendment. *Id.* at 998.
- 5. Fox qualifies for First Amendment protection under the first prong of the *Rogers* test since the undisputed facts establish that Fox's use of the word "empire" in connection with *Empire* and its Soundtracks has artistic relevance to the works, which tell the story of a New York (the "Empire State") based conglomerate, called "Empire Enterprises."
- 6. Fox qualifies for First Amendment protection under the second prong of the *Rogers* test since the undisputed facts establish that Fox's use of the word "empire" in connection with *Empire* and its Soundtracks does not explicitly mislead consumers as to the source or content of the show and its Soundtracks.
- 7. Because Fox qualifies for First Amendment protection under both prongs of the *Rogers* test, defendant's federal trademark infringement claim is barred as a matter of law. *See*, *e.g.*, *MCA*, 296 F.3d at 900.
- 8. The First Amendment also bars claims for trademark dilution unless the speech at issue is "purely commercial." *Id.* at 906-07.
- 9. Because Fox's use of the word "empire" in connection with *Empire* and its Soundtracks has artistic relevance to the works, Fox's speech is not "purely commercial" and defendant's federal dilution claim is barred as a matter of law. *See Stewart Surfboards, Inc. v. Disney Book Grp., LLC*, 2011 WL 12877019, at \*8

(C.D. Cal. May 11, 2011).

- 10. The First Amendment defense applies equally to bar defendant's state law trademark and dilution claims and state and federal unfair competition claims. *See Kerr Corp. v. Tri Dental, Inc.*, 2013 WL 990532, at \*4 (C.D. Cal. Mar. 11, 2013); *E.S.S.*, 547 F.3d at 1101; *Gucci Am., Inc. v. Pieta*, 2006 WL 4725706, at \*7 (C.D. Cal. Jan. 23, 2006).
- 11. In addition to the First Amendment protections, Fox's use of "empire" is not actionable unless it creates a likelihood of confusion with defendant's products that results in mistaken purchasing decisions. *See M2 Software, Inc. v. Madacy Entm't*, 421 F.3d 1073, 1080 (9th Cir. 2005); *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 676-77 (9th Cir. 2005).
- 12. Courts in the Ninth Circuit use the factors set forth in *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), to evaluate whether there is a likelihood of this type of confusion: "(1) strength of the mark; (2) proximity [or relatedness] of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) type of goods and the degree of care likely to be exercised by the purchaser; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines." *M2 Software*, 421 F.3d at 1080.
- 13. It is not necessary for all of the *Sleekcraft* factors to favor a party in order for a Court to grant summary judgment. *Surfvivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 631-34 (9th Cir. 2005).
- 14. This standard also governs claims for unfair competition and trademark infringement under California law. *See, e.g., Grupo Gigante SA De CV v. Dallo & Co., Inc.*, 391 F.3d 1088, 1100 (9th Cir. 2004); *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994).
  - 15. Under the *Sleekcraft* test, defendant has failed to establish a genuine

1	issue of material fact that confusion between Fox's marks and defendant's marks is	
2	probable, and defendant's claims for trademark infringement thus fail as a matter of	
3	law. See, e.g., Cohn v. Petsmart, Inc., 281 F.3d 837, 842-44 (9th Cir. 2002).	
4	16. Trademark dilution prohibits uses of a "famous mark that is	
5	distinctive" in a manner "likely to cause dilution by blurring or dilution by	
6	tarnishment of the famous mark." 15 U.S.C. § 1125(c)(1).	
7	17. "A mark is famous if it is widely recognized by the general consuming	
8	public of the United States as a designation of source of the goods or services of the	
9	mark's owner." 15 U.S.C. § 1125(c)(2)(A); see also Xen, Inc. v. Citrix Sys., Inc.,	
10	2012 WL 5289609, at *6 (C.D. Cal. Oct. 25, 2012)	
11	18. California trademark dilution claims "are subject to the same analysis	
12	as the federal Lanham Act claims." Kerr, 2013 WL 990532, at *4.	
13	19. Defendant has failed to establish a genuine issue of material fact that	
14	its marks are famous, barring defendant's state and federal trademark dilution	
15	claims as a matter of law. See, e.g., Xen, Inc., 2012 WL 5289609, at *6; Kerr, 201	
16	WL 990532, at *4.	
17	20. For the foregoing reasons, Fox is entitled to summary judgment on all	
18	of defendant's Counterclaims and on all of Fox's claims for declaratory judgment.	
19		
20	Dated: January 15, 2016 DANIEL M. PETROCELLI	
21	MOLLY M. LENS	
22	CAMERON H. BISCAY O'MELVENY & MYERS LLP	
23		
24	By: <u>/s/ Daniel M. Petrocelli</u> Daniel M. Petrocelli	
25		
26	Attorneys for Twentieth Century Fox Television, a division of Twentieth	
27	Century Fox Film Corporation, and	
28	Fox Broadcasting Company FOX'S REPLY STATEMENT OF	
	120 UNCONTROVERTED FACTS &	

CONCLUSIONS OF LAW CASE NO. 2:15-CV-02158 PA(FFMX)